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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

Nos. 433-434

DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES,

Appellant,

vs.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT

APPEALS FROM THE SUPREME COURT OF THE COMMONWEALTH OF MASSACHUSETTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, David Rines, Administrator of the Estate of Lucy L. Rines, the petitioner-appellant, submits herewith his statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final rescript or judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered in this cause.

Opinions Below

This case originated in the said Supreme Judicial Court as one of two petitions, later numbered 11,261 and 11,262, for writs of certiorari and mandamus, in which the appellant was the petitioner, and The Honorable Justices of the Superior Court were the respondents. Though the petitioner originally endeavored, in his allegations in the respective petitions, to maintain a line of separation between them, that line of separation has since become lost, for the two petitions were argued together, as a unit, in the said Supreme Judicial Court, with the allegations of each petition regarded as applicable also to the other petition, and the two cases were accordingly treated in a single opinion, reported in the Advance Sheets, Opinions of the Supreme Judicial Court, 1953, pages 645-650. A copy of this opinion is attached hereto as Appendix A.

On October 10, 1952, the Supreme Judicial Court of the Commonwealth of Massachusetts delivered identical, very brief, unreported opinions in two companion cases Nos. 11,207 and 11,208, as follows:

> No. 11,207, David Rines, Administrator of the Estate of Lucy L. Rines, Petition to Establish The Truth of Exceptions in the Suit in the Superior Court of the said Commonwealth, No. 42024, David Rines, Administrator of the Estate of *Lucy L. Rines* v. *Armin Klein;*
>
> No. 11,208, David Rines, Administrator of the Estate of Lucy L. Rines, Petition To Establish the Truth of Exceptions in the suit in the Superior Court of the said Commonwealth, No. 42028, David Rines, Administrator of the Estate of *Lucy L. Rines* v. *Reuben B. Davidoff.*

The said identical unreported opinions in the said two further cases Nos. 11,207 and 11,208 read as follows:

> After hearing, petition dismissed on ground the exceptions do not appear meritorious.

The petitioner will in due course file a motion in this Court for an order permitting him to supplement the record of the above-entitled suit by adding thereto certified copies of the records in the Supreme Judicial Court of the Commonwealth of Massachusetts in the said two cases.

Jurisdiction

The rescript or judgment of the said Supreme Judicial Court was entered in each of the said two cases, Nos. 11,261 and 11,262, on July 3, 1953. Petitions for rehearing were presented promptly to the Chief Justice, and were considered by the full Court of the said Supreme Judicial Court, after which they were denied. Adhering to its usual practice, the said Supreme Judicial Court did not make of record either the petitions for rehearing or the action taken thereon. Petitions for appeal in each of the said two cases, Nos. 11,261 and 11,262 are presented to the said Chief Justice herewith, to wit, on September 19, 1953.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2).

The State Statutes the Validity of Which Is Involved

This appeal involves the validity, as applied in this case, of three state statutes, Chapter 231, Sections 111, 113 and 127 of the General Laws of the Commonwealth of Massachusetts, Tercentenary Edition. Together with a fourth statute, Chapter 231, Section 117 of the said General Laws, they are quoted in Appendix B.

The Nature of the Case, the Rulings Which Give Jurisdiction and the Manner in Which the Federal Questions Sought to Be Reviewed Were Raised.

The appeal is from a refusal of the Supreme Judicial Court of the Commonwealth of Massachusetts to confine the

Superior Court of the said Commonwealth to its proper jurisdictional sphere. The controversy arose under the following circumstances.

The petitioner-appellant is the plaintiff in the following two (and additional) suits in the Superior Court of the Commonwealth of Massachusetts:

> No. 42024, David Rines, Administrator of the Estate of *Lucy L. Rines* v. *Armin Klein.*
>
> No. 42028, David Rines, Administrator of the Estate of *Lucy L. Rines* v. *Reuben B. Davidoff.*

After consolidation for trial, the suits were tried to a jury, which awarded the appellant damages. The presiding judge of the Superior Court thereupon set the jury's verdicts aside, and entered verdicts for the defendants. This finally disposed of the said two suits in the Superior Court, the appellant's property rights in the jury's verdicts became vested, as set forth in a consolidated bill of exceptions, and the jurisdiction of the Superior Court over these two suits became terminated, except for its duty either to allow or disallow the consolidated bill of exceptions.

The presiding judge refused, however, to perform this duty thereby preventing the appellant from obtaining a review, in the Supreme Judicial Court, of the proceedings in the Superior Court; and, on October 3, 1951, three and one-half years after the said two suits had been finally disposed of by the directed verdicts, purporting to act under the authority of one of the said three state statutes, Chapter 231, Section 127, he ordered new trials in the said two suits. The appellant has alleged, and the demurrers admit, that, in ordering the new trials, the presiding judge was motivated by bias and prejudice. He therefore issued the orders for new trials pursuant to a secret hearing, held without notice, in a locked private room of the court house, from which not only the public, but also the appellant him-

self, were excluded, without affording the appellant an opportunity to present evidence or to be heard, and without even setting aside the directed verdicts. The said two suits are therefore finally terminated, by reason of the directed verdicts, and also they are still pending, by reason of the orders for new trial.

The appellant excepted to the orders for new trial under the provisions of another of the said three state statutes, Chapter 231, Section 113. The said presiding judge disallowed the bills of exceptions to the orders for new trial, however, holding, in part, that they are not "proper" bills of exceptions.

The petitioner thereupon filed, in the Supreme Judicial Court, under the provisions of the said fourth state statute, Chapter 231, Section 117, the before-mentioned two Petitions To Establish The Truth of Exceptions, Nos. 11,207 and 11,208. These petitions, however, as before stated, were dismissed, in the Supreme Judicial Court.

The first federal question, that relating to the repugnancy of the state statute, Chapter 231, Section 127, to the Fourteenth Amendment, was raised in the said petitions, Nos. 11,261 and 11,262, for writs of certiorari and mandamus, filed in the Supreme Judicial Court. These petitions were heard, in the first instance, by a single justice of the Supreme Court, who sustained demurrers thereto. Though the single justice did not deliver any opinion, the reason for his sustaining the demurrers appears clearly from the record in the mandamus case, No. 11,262. Of the eight grounds of demurrer in this case, the single justice sustained the demurrer upon the first ground only, reading as follows:

1. That the said petition does not set forth any matter or cause whatsoever entitling the petitioner to relief against the respondents, Justices of the Superior Court.

The single justice refused to sustain the demurrer upon any of the seven remaining grounds, including the following fourth ground:

4. Mandamus cannot be granted since the petitioner has another effectual remedy available.

The rulings of the single justice, therefore, were to the effect that the question of the jurisdiction of the Superior Court, under the provisions of the said statute, Chapter 231, Section 127, to order the new trials could properly be tested on petition for a writ of mandamus, and also that, when so applied as to authorize the said orders for new trial, the said state statute, Chapter 231, Section 127, is not repugnant to the due-process clause of the Fourteenth Amendment. The single justice thus ruled adversely to the appellant with respect to the first federal question.

The petitioner excepted to the action of the single justice sustaining the demurrers in the said two suits. It is these exceptions that the Full Court of the Supreme Judicial Court overruled in its said decision of July 3, 1953.

This decision of the Full Court, however, is directly contrary to that of the single justice.

In the first place, the Full Court has declined to affirm the decision of the single justice sustaining the demurrer upon the said first ground quoted above. From this it follows that the Full Court has therefore refused to agree with the holding of the single justice that the said statute, Chapter 231, Section 127, as applied by the Superior Court, when ordering the new trials, is not repugnant to the due-process clause of the Fourteenth Amendment.

The Full Court has also, however, refused to disagree with that holding of the single justice. It has ruled, instead, that the appellant should not be given any answer whatever to his first federal question.

Secondly, therefore, the Full Court has also reversed the action of the single justice in refusing to sustain the demurrer upon the basis of the fourth ground, quoted above.

The Full Court has gone further, however, and stated what is the "effectual remedy available" to the appellant, as alleged under that fourth ground. It is two-fold. First, that the appellant's contentions could have been raised and presented to this Court by exceptions taken and properly followed up in due course under the provisions of G. L. (Ter. Ed.) c. 231, s. 113, as amended by St. 1945, c. 328; and secondly, that the appellant might have requested the trial judge to exercise his discretion to that end by reporting the action taken by him under G. L. (Ter. Ed.) c. 231, s. 111.

This decision of the Full Court came to the appellant as a complete surprise. In the first place, the appellant not only "could have", but did actually, raise his contentions by bills of exceptions, under the provisions of the said state statute, Chapter 231, section 113; and secondly, he did request the trial judge to report the case under the provisions of the said state statute, Chapter 231, section 111.

The appellant's bills of exceptions, as before stated however, were disapproved by the presiding judge as not "proper", within the meaning of the said state statute, Chapter 231, section 113, and the appellant's Petitions To Establish the Truth of Exceptions, Nos. 11,207 and 11,208 were summarily dismissed by the Supreme Judicial Court. The Supreme Judicial Court had therefore held, in those cases, Nos. 11,207 and 11,208, that the appellant could not raise, by exceptions under the provisions of the said state statute, Chapter 231, section 113, the contentions that, in the said decision of July 3, 1953, it later said "could have been raised."

And the presiding judge, admittedly biased and prejudiced had refused and ignored the appellant's requests

for a report under the provisions of the said state statute, Chapter 231, section 111.

The appellant has therefore been driven out of court without being able to obtain even a hearing (except before the single justice, whose decision the Full Court had overturned) upon his contention, that purportedly under the provisions of the state statute, Chapter 231, section 127, he has been deprived of his property, vested in him by the jury's verdicts in violation of the due-process clause of the Fourteenth Amendment of the Constitution of the United States; from which it follows that, as applied by the Supreme Judicial Court, the two statutes, Chapter 231, sections 111 and 113 of the said General Laws are themselves repugnant to the due-process clause of the Fourteenth Amendment.

Since the Supreme Judicial Court was apparently unaware of these facts, the appellant presented them to the Chief Justice in petitions for rehearing. The Full Court considered the petitions for rehearing and denied them. Though, under the practice in the Supreme Judicial Court, neither the petitions for rehearing, nor the action taken thereon are of record, this denial constituted a holding, that, as applied, the state statutes, Chapter 231, sections 111 and 113, are not repugnant to the due-process clause of the Fourteenth Amendment. The appellant has also set forth the repugnancy of the three state statutes, Chapter 231, sections 111, 113 and 127, to the due-process clause of the Fourteenth Amendment, in the Assignment of Errors accompanying his petition for appeal, *Johnson* v. *New York Life Insurance Company*, 187 U.S. 491, 495, *Saunders* v. *Shaw*, 244 U.S. 317, 320, *Herndon* v. *Georgia*, 295 U.S. 441, 443-444; see also Justice Cardozo's dissenting opinion page 447.

The following additional decisions sustain the jurisdic-

tion of the Supreme Court to review the rescript or judgment on direct appeal in this case:

With respect to the repugnancy of a state statute, as applied, to the Constitution of the United States:

Dahnke-Walker Milling Company v. *Bondurant*, 257 U.S. 282, 290.

Richfield Oil Corp. v. *State Board of Equalization*, 329 U.S. 69, 86.

Illinois ex rel. McCollum v. *Board of Education of School District No. 71, Champaign County, Illinois*, 333 U.S. 203, 206.

With respect to the refusal of a state court to decide the question of such repugnancy constituting an equivalent of a holding that the state statute is not so repugnant:

Lawrence v. *State Tax Commission of Mississippi*, 286 U.S. 276, 282.

With respect to the finality of the decision of Supreme Judicial Court:

Hartman v. *Greenhow*, 102 U.S. 672, 675.

Detroit and Mackinac Railway Company v. *Michigan Railroad Commission*, 240 U.S. 564, 571.

Questions Presented

One. After the Superior Court has set aside the verdicts of a jury for the appellant in two suits (Nos. 42024 and 42025) and has directed verdicts for the defendants, thus finally terminating those two suits and losing further jurisdiction thereover except for its duty either to allow or disallow the plaintiff's consolidated bill of exceptions, may the Superior Court, consistent with the due-process clause of the Fourteenth Amendment, though purporting

to act under the provisions of a state statute (G.L. c. 231, § 127, Ter. Ed.), order new trials in the said two suits?

Two. May those orders for new trial, though purporting to be authorized by the said state statute (G.L. c. 231, § 127, Ter. Ed.), be issued, consistent with due process, pursuant to a secret hearing, held without notice, in a locked private room, of the court house, from which not only the public, but also even the petitioner himself, though both a party and an attorney of record in the said suits was deliberately excluded by a judge of the Superior Court who is admitted by demurrer to be biased and prejudiced?

Three. Is it consistent with the prerequisites of judicial determination of facts in accordance with the standards of due process to order new trials, though purportedly authorized by the said state statute (G.L. c. 231, § 127, Ter. Ed.), upon the basis of holdings by a biased and prejudiced judge that are unsupported by evidence, and without affording the appellant an opportunity to present evidence or to be heard?

Refusing to answer any of these three questions, the Supreme Judicial Court has held that the appellant's remedy is not to seek certiorari or mandamus, but, rather, by way of bills of exceptions to the orders for new trial, under the provisions of another state statute (G.L. c. 231, s. 113, Ter. Ed.), and by way of a report of the judge of the Superior Court, under the provisions of a further state statute (G.L. c. 231, s. 111, Ter. Ed.)

Four. In view of the fact that, as appears from the said cases, Nos. 11,207 and 11,208, Petitions to Establish the Truth of Exceptions, the appellant has actually filed such bills of exceptions to the orders for new trial, which petitions, however, the Supreme Judicial Court has summarily dismissed, is that other state statute (G.L. c. 231, § 113, Ter. Ed.) as so applied by the Supreme Judicial Court repug-

nant to the due-process clause of the Fourteenth Amendment?

Five. In view of the fact that the admittedly biased and prejudiced judge of the Superior Court refuses to report the cases to the Supreme Judicial Court, is the further state statute (G.L. c. 231, s. 111, Ter. Ed.), as so applied, repugnant to the due-process clause of the Fourteenth Amendment?

The Questions Involved Are Substantial

The questions involved in this case are just as important as those that were involved in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579. Our liberties will be no more safe if the judiciary should be allowed to exceed its jurisdictional powers than if the President of the United States should be allowed to seize the steel plants.

If this situation had arisen in the federal courts, the appellant's vested property rights would have been restored to him forthwith, *ex parte Simons*, 247 U.S. 231, *ex parte Skinner & Eddy Corporation*, 265 U.S. 86.

A litigant who is compelled to submit to the caprice of a biased and prejudiced judge is denied due process, *Tumey* v. *Ohio*, 273 U.S. 510, 522-523, 535. See also the concurring opinion of Mr. Justice Brandeis in *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 73. Even an unbiased judge is required to permit a litigant to present evidence, and to be heard, *Brinkerhoff-Faris Trust and Savings Company* v. *Hill*, 281 U.S. 673, 678, 682, *Shelley* v. *Kraemer*, 334 U.S. 1, 16.

Conclusion

The validity of three statutes, not merely one, as applied by both the Superior Court and the Supreme Judicial Court of the Commonwealth of Massachusetts has been drawn into

question on the ground of their being repugnant to the due-process clause of the Fourteenth Amendment. The questions involved are of real substance and great importance.

It is therefore respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal.

Respectfully submitted,

DAVID RINES,
Counsel for Appellant.

RINES AND RINES,
Of Counsel.

APPENDIX "A"

OPINION OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS—July 3rd, 1953

DAVID RINES, administrator, *vs.* JUSTICES OF THE SUPERIOR COURT

(and a companion case [1])

Suffolk. April 6, 1953.—July 3, 1953

Present: QUA, C. J., LUMMUS, WILKINS, & COUNIHAN, JJ.

Certiorari. Mandamus. Practice, Civil, Review of interlocutory action, New trial. *Supreme Judicial Court,* Review of interlocutory action.

Cases heard in the Supreme Judicial Court for the county of Suffolk by *Williams,* J., on demurrer.

QUA, C. J. The first case is a petition in this court for a writ of certiorari to "vacate, set aside and annul" an order for a new trial entered in the Superior Court on October 3, 1951, in each of two actions of tort there pending and numbered respectively 42024 and 42028. The second case is a petition in this court for a writ of mandamus directing the respondent justices to "vacate, set aside and annul" the same orders for new trial. After the sustaining of demurrers by the single justice the cases are before the full court on the petitioner's bills of exceptions.

The substance of the material allegations of the petition in the first case is that the petitioner, as administrator of the estate of his deceased wife, brought each of the two actions of tort against a physician for alleged malpractice causing personal injury to the plaintiff's wife and bringing about her death; that the two tort actions were tried together; that the trial consumed approximately three and one half weeks and resulted in verdicts for the plaintiff in No. 42024 of $2,000 on the count for death and of $6,000 on the count for personal injury and in No. 42028 of $2,000 on

[1] The companion case is brought by the same petitioner against the same respondents.

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the count for death and of $5,000 on the count for personal injury, the trial judge reserving leave to enter verdicts for the defendants; that thereafter the defendant in each of the tort cases moved for the entry of verdicts in his favor under the leave reserved and also moved for a new trial on each of said counts on the usual grounds; that thereupon, on February 27, 1948, the judge set aside the verdicts for the plaintiff in each action, and in No. 42024 he entered a verdict for the defendant on the count for death and "took no further formal action" as to that count, but denied the defendant's motion for entry of a verdict in his favor on the count for personal injury and granted the defendant's motion for new trial on that count, and in No. 42028 he entered a verdict for the defendant on both the count for death and the count for personal injury and "took no further formal action" as to those counts on the motion for new trial; that the plaintiff then took steps extending over a period of more than three years to prepare successive drafts of a consolidated bill of exceptions for both actions, the latest draft of which was presented to the judge on June 5, 1951, but was never allowed; and that finally on October 3, 1951, the judge "issued orders for new trial" on the death count in No. 42024 and on both counts in No. 42028, these being the counts on which he had previously entered verdicts for the defendants under leave reserved. It is alleged that the judge gave as his reasons for granting new trial that he was entirely satisfied that a medical witness who had been called by the plaintiff "did not have the surgical experience which he testified he did have; that he was not qualified to give expert opinion testimony in these cases; that . . . [the judge's] ruling permitting him to testify was a mistake; that this mistake was the substantial, if not the sole factor in producing verdicts for the plaintiff . . . ; that these verdicts represent a miscarriage of justice"; and that he "therefore" ordered new trials on the specified counts on the ground that the verdicts were "against the weight of the evidence."

The gist of the petitioner's grievance is that the judge finally, after more than three years, granted a new trial upon the same counts upon which he had previously entered

verdicts for the defendants under leave reserved, without the filing by the defendants of any new motions for new trial; that by entering the verdicts on these counts the judge had "automatically" by implication denied the defendants' motions for new trial as to such counts and could not subsequently allow a new trial upon them on the same motions. There are further allegations that need not be stated in detail in which the petitioner asserts, or upon which he bases contentions that all parties in the tort actions and their counsel understood that no further action was to be taken on the motions for new trial as to those counts; that by "accepting the directed verdicts in their behalf, under leave reserved," and by taking part in the subsequent proceedings relative to the plaintiff's exceptions the defendants "had acquiesced" in the "automatic" denials of their motions as to those counts and to that extent had waived their motions and became estopped to seek further action upon them; that the new trial was granted without hearing [2] and for a reason not stated in the motions for new trial; that the original action of the judge in entering the verdicts on the counts in question was res judicata as to those counts; that the orders of October 3, 1951, for a new trial deprive the petitioner of his constitutional and vested rights; that in reliance upon the judge's original action the petitioner had waived his count for personal injury in No. 42024; that he had been put to expense and labor in connection with his bills of exceptions in the tort actions; and that as matters now stand he can get no relief without first trying the tort actions over again in accordance with the judge's orders.

The allegations in the second case are in general similar but with added allegations as to bias and prejudice of the judge and lack of a sufficient hearing before the granting of a new trial by the orders of October 3, 1951. It is not necessary to state these allegations in detail.

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[2] It is stated, however, in the petitioner's reply brief in the first case that there was a hearing on these motions in 1948. His grievance seems to be that he personally was in effect excluded from a second or renewed hearing in 1951, which he also contends was held on inadequate notice, although his counsel was present.

From the foregoing summary of the allegations of the petitions it is apparent that every alleged error complained of and every contention made could have been raised and presented to this court by exceptions taken and properly followed up in due course under the provisions of G. L. (Ter. Ed.) c. 231, § 113, as amended by St. 1945, c. 328. It would be hard to find any principle more fully established in our practice than the principle that neither mandamus nor certiorari is to be used as a substitute for ordinary appellate procedure or used at any time when there is another adequate remedy. Some of the cases are collected in the footnote.[3] See also *Kevorkian* v. *Superior Court*, 295 Mass. 355. It cannot be held that the usual remedy by bill of exceptions is not adequate, even though it may require a new trial, as not infrequently it does. These propositions have been so long in force and acted upon so unvaryingly in this Commonwealth that it would take an extreme case indeed to induce us to depart from them, even

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[3] *Savage* v. *Gulliver*, 4 Mass. 171. *Selectmen of Gardner* v. *Templeton Street Railway*, 184 Mass. 294, 297-298. *Attorney General* v. *New York, New Haven & Hartford Railroad*, 197 Mass. 194, 199. *Crocker* v. *Justices of the Superior Court*, 208 Mass. 162, 164. *Casey* v. *Justice of the Superior Court*, 229 Mass. 200, 201. *Daly* v. *Mayor of Medford*, 241 Mass. 336, 339. *Cambridge Savings Bank* v. *Clerk of Courts*, 243 Mass. 424, 427-428. *Mayor of Medford* v. *Judge of First District Court of Eastern Middlesex*, 249 Mass. 465, 468. *County Commissioners of Essex* v. *Mayor of Newburyport*, 252 Mass. 407. *McLaughlin* v. *Mayor of Cambridge*, 253 Mass. 193, 199. *Peckham* v. *Mayor of Fall River*, 253 Mass. 590, 592. *Bradley* v. *Zoning Adjustment Board of Boston*, 255 Mass. 160, 163. *Bushell* v. *Mayor of Malden*, 260 Mass. 476. *Prusik* v. *Board of Appeal of Boston*, 262 Mass. 451, 453. *Godfrey* v. *Building Commissioner of Boston*, 263 Mass. 589, 592-593. *Whitney* v. *Judge of District Court of Northern Berkshire*, 271 Mass. 448, 458-459. *Maher* v. *Commonwealth*, 291 Mass. 343, 345-346. *Amory* v. *Assessors of Boston*, 306 Mass. 354, 357-358. *Dube* v. *Mayor of Fall River*, 308 Mass. 12, 14. *Jordan Marsh Co.* v. *Labor Relations Commission*, 312 Mass. 597, 599. *Worcester Gas Light Co.* v. *Water Commissioners of the Woodland Water District of Auburn*, 314 Mass. 60, 62-63. *Seney* v. *Board of Health of Northampton*, 314 Mass. 272, 273. *Parrotta* v. *Hederson*, 315 Mass. 416, 420-421. *Tracht* v. *County Commissioners of Worcester*, 318 Mass. 681, 686. *Flynn* v. *Board of Registration in Optometry*, 320 Mass. 29, 30. *Administrator of the Office of Price Administration* v. *Chook*, 320 Mass. 187, 192. *Howe* v. *Attorney General*, 325 Mass. 268, 270.

though the petitioner has succeeded in finding a number of decisions in other jurisdictions in which the practice apparently differs from ours and in which one of the extraordinary writs was employed for a purpose somewhat similar to that for which the petitioner seeks to employ those writs in these cases. See, for example, *Ex parte Simons*, 247 U. S. 231; *Ex parte Skinner & Eddy Corp.* 265 U. S. 86; *S. M. Hamilton Coal Co.* v. *Watts*, 232 Fed. 832; *Quevedo* v. *Superior Court*, 131 Cal. App. 698.

We think it not necessary to consider the further question whether certiorari is ever available where the proceedings in the court below are "according to the course of the common law." See G. L. (Ter. Ed.) c. 249, § 4, as appearing in St. 1943, c. 374, § 1; *Parks* v. *Mayor & Aldermen of Boston*, 8 Pick. 218, 227; *Mendon* v. *County Commissioners of Worcester*, 5 Allen, 13, 15; *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206, 212; *Tewksbury* v. *County Commissioners of Middlesex*, 117 Mass. 563, 564; *Lynch* v. *Crosby*, 134 Mass. 313; *Fino* v. *Municipal Court of the City of Boston*, 326 Mass. 277, 280; *Butman* v. *Fence Viewers of Chelsea*, 327 Mass. 386. Neither need we consider the general rule, which may be subject to qualification, that mandamus is a remedy for inaction and not available where action has already been taken. *Howe* v. *Attorney General*, 325 Mass. 268, 270.

In these cases apparently the petitioner prefers to have the verdicts which the judge entered against him stand, subject to such exceptions as he may have preserved, rather than to take his chance on a new trial. It is possible to understand this preference. But the petitioner's position is inconsistent with another principle, also of general application in this Commonwealth, that this court cannot be required to deal with cases in interlocutory stages, except where the trial judge has exercised his discretion to that end by reporting the action taken by him under G. L. (Ter. Ed.) c. 231, § 111, or in equity under G. L. (Ter. Ed.) c. 214, § 30. Those sections are designed to furnish a means for immediate review by this court of interlocutory action where justice requires such review. In the absence of a report by the trial judge the proper course is to proceed

in accordance with his orders until the case is ready for final disposition. *Weil* v. *Boston Elevated Railway*, 216 Mass. 545. *Anti* v. *Boston Elevated Railway*, 247 Mass. 1, *Macchiaroli* v. *Howell*, 294 Mass. 144. *John Gilbert Jr. Co.* v. *C. M. Fauci Co.* 309 Mass. 271, 273. See *Gulesian* v. *Richardson*, 306 Mass. 184, 186-187. The cases before us present no special circumstances adequate to take them out of the general rule. The fact that a new trial must be had imposes no greater hardship than is incurred in carrying out many kinds of interlocutory orders. It is not even certain that decisions by us now in favor of the petitioner in the cases before us would end the tort cases, since if we understand the petitioner correctly, he claims still to have exceptions pending in those cases wherein he attacks the verdicts entered by the judge on leave reserved.

There is nothing in *Mengel* v. *Justices of the Superior Court*, 313 Mass. 238, inconsistent with what is here said. In that case the petitioners had an absolute statutory right to an immediate preliminary determination by a single justice of this court of the matter of a temporary injunction in a labor dispute. That right would have been forever lost to them if relief had not been given before the main suit could be heard in the Superior Court.

In each case the entry will be

Exceptions overruled.

David Rines & Robert H. Rines, for the petitioner.

Harris A. Reynolds, Assistant Attorney General,(Joseph H. Elcock, Jr., Assistant Attorney General, with him,) for the respondents.

APPENDIX "B"

STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS IN QUESTION, GENERAL LAWS, TERCENTENARY EDITION

Chapter 231, section 111, Vol. II, page 2876

"A justice of the supreme judicial, the superior or the land court, after verdict, or after a finding of the facts by the court, may report the case for determination by the full court. If a justice of the supreme judicial or the su-

perior court is of opinion that an interlocutory finding or order made by him ought to be determined by the full court before any further proceedings in the trial court, he may report the case for that purpose and stay all further proceedings except such as are necessary to preserve the rights of the parties. A justice of the supreme judicial or the superior court may, upon request of the parties, in any case where there is agreement as to all the material facts, report the case to the full court for determination without making any decision thereon."

Chapter 231, section 113, as amended by St. 1945, c. 328, Vol. II page 2876

"Exceptions may be alleged by any party aggrieved by an opinion, ruling, direction or judgment of the supreme judicial court, of the superior court, or of the land court, rendered upon any matter of law in any civil cause, according to the course of the common law or otherwise, tried by a jury or heard by the court, or upon a motion for a new trial. The exceptions shall be reduced to writing in a summary manner and filed with the clerk, and notice thereof shall be given to the adverse party, in civil cases tried by a jury, within twenty days after the verdict is rendered, and in cases tried without a jury, within twenty days after the notice of the decision has been received, unless further time is allowed by the court. The presiding justice shall thereafter, upon their presentation to him by any party to the action, examine the exceptions, and after hearing the parties, determine whether they are conformable to the truth. The excepting party may be allowed to make such amendments to his bill of exceptions as will make it a more accurate statement of the exceptions originally filed by him. If the presiding justice finds that the exceptions, with any amendments thereof thus allowed, are conformable to the truth, he shall allow them. The presiding justice may, if, in his opinion, a bill of exceptions is filed in good faith, and justice so requires, allow such bill of exceptions although the expecting party or his attorney failed, through inadvertence, to comply with all of the provisions of this section. If, through inadvertence, a party who has duly

claimed exceptions failed to file a bill of exceptions within said twenty days or within such further time as may have been allowed, the presiding justice may, before final judgment, upon motion after notice and hearing, allow a bill of exceptions to be filed and may allow such bill of exceptions."

Chapter 231, section 117, Vol. II, page 2878

"If the presiding justice, or another justice acting under section one hundred and fifteen, disallows or fails to sign and return the exceptions or alters any statement therein, and either party is aggrieved thereby, the truth of the exceptions presented may be established before the full court upon petition stating the grievance, and thereupon, the truth of the exceptions being established, they shall be heard, and the same proceedings taken, as if the exceptions had been duly allowed and entered. The supreme judicial court shall make rules for settling the truth of exceptions alleged and not allowed."

Chapter 231, section 127, Vol. II, page 2881

"The court may, at any time before judgment, set aside the verdict in a civil action and order a new trial for any cause for which a new trial may by law be granted; but a verdict shall not be set aside except on written motion by a party to the cause, stating the reasons relied upon in its support, filed and heard after notice to the adverse party according to the rules of the court. A verdict shall not be set aside as excessive until the prevailing party has first been given an opportunity to remit so much thereof as the court adjudges is excessive. A verdict shall not be set aside solely on the ground that the damages are inadequate until the parties have first been given an opportunity to accept an addition to the verdict of such amount as the court adjudges reasonable."

FILED
OCT 29 1953
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 433

DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES, *Appellant*

v.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT, *Appellees*

APPELLANT'S MOTION TO SUPPLEMENT THE RECORD AND MEMORANDUM

DAVID RINES
RINES AND RINES
Attorneys for the Appellant,
No. Ten Post Office Square,
Boston 9, Massachusetts

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

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DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES, *Appellant*

v.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT, *Appellees*

APPELLANT'S MOTION TO SUPPLEMENT THE RECORD

Now comes the appellant in the above-entitled suit, David Rines, Administrator of the Estate of Lucy L. Rines, and moves for an order permitting him to supplement the record of the above-entitled suit by adding thereto the following:

1. The annexed Exhibit A, a certified copy of the record in the Supreme Judicial Court of the Commonwealth of Massachusetts, No. 11,207, David Rines, Administrator of the Estate of Lucy L. Rines, "Plaintiff's Petition to Establish the Truth of Exceptions", in the suit in the Superior Court for the Commonwealth of Massachusetts, No. 42024,

David Rines, Administrator of the Estate of Lucy L. Rines v. Armin Klein.

2. The annexed Exhibit B, a certified copy of the record in the Supreme Judicial Court of the Commonwealth of Massachusetts, No. 11,208, David Rines, Administrator of the Estate of Lucy L. Rines, "Plaintiff's Petition to Establish the Truth of Exceptions", in the suit in the Superior Court for the Commonwealth of Massachusetts, No. 42028, David Rines, Administrator of the Estate of Lucy L. Rines v. Reuben B. Davidoff.

3. A petition for rehearing, and the action taken thereon, in the suit, No. 11,262, in the Supreme Judicial Court of the Commonwealth of Massachusetts, entitled, David Rines, Administrator of the Estate of Lucy L. Rines, Petitioner v. The Honorable Justices of the Superior Court, Respondents. This is the suit involved in this appeal.

It is further moved that this Court request the Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts to send to this Court, for inspection, the said petition for rehearing, and also a like petition for rehearing in the companion case, No. 11,261. The Chief Justice has stated to this appellant that he will honor such request.

The grounds for this motion are stated in the accompanying memorandum, from which it appears that this Court will need these additional documents, or, at least, may need them, to help this Court decide whether the appellant is correct in his contention, on this appeal, that he has been denied due process.

DAVID RINES
RINES AND RINES
Attorneys for the Appellant,
No. Ten Post Office Square,
Boston 9, Massachusetts

Supreme Court of the United States

OCTOBER TERM, 1953

No. 433

DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES, *Appellant*

v.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT, *Appellees*

APPELLANT'S MEMORANDUM IN SUPPORT OF HIS MOTION TO SUPPLEMENT THE RECORD

This is a motion by the appellant for an order permitting him to supplement the record in the above-entitled suit by adding thereto the following:

1. The annexed Exhibit A, a certified copy of the record in the Supreme Judicial Court of the Commonwealth of Massachusetts, No. 11,207, David Rines, Administrator of the Estate of Lucy L. Rines, "Plaintiff's Petition to Establish the Truth of Exceptions", in the suit in the Superior Court for the Commonwealth of Massachusetts, No. 42024, David Rines, Administrator of the Estate of Lucy L. Rines v. Armin Klein.

2. The annexed Exhibit B, a certified copy of the record in the Supreme Judicial Court of the Commonwealth of Massachusetts, No. 11,208, David Rines, Administrator of the Estate of Lucy L. Rines, "Plaintiff's Petition to Establish the Truth of Exceptions", in the suit in the Superior Court for the Commonwealth of Massachusetts, No. 42028, David Rines, Administrator of the Estate of Lucy L. Rines v. Reuben B. Davidoff.

3. A petition for rehearing, and the action taken thereon, in the suit, No. 11,262, in the Supreme Judicial Court of the Commonwealth of Massachusetts, entitled, David Rines,

Administrator of the Estate of Lucy L. Rines, Petitioner v. The Honorable Justices of the Superior Court, Respondents. This is the suit involved in this appeal.

The above-entitled suit and the companion suit, No. 434 are appeals from the final rescript or judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts made and entered on July 3, 1953.

The records of the said Exhibits A and B, under items 1 and 2, are the same as those that are referred to in the "STATEMENT AS TO JURISDICTION" in the above-entitled suit, under the heading: "Opinions Below".

The Petition for Rehearing, item 3, is discussed in the said "STATEMENT AS TO JURISDICTION" under the heading "The Nature of the Case, The Rulings Which Give Jurisdiction and The Manner In Which The Federal Questions Sought To Be Reviewed Were Raised", and it is there stated that, under the practice in the said Supreme Judicial Court, neither petitions for rehearing nor the action taken thereon are made of record.

Prior to the said rescript or judgment, the appellant had contended that, as applied, the state statute, chapter 231, section 127 of the General Laws of the Commonwealth of Massachusetts, is repugnant to the Fourteenth Amendment.

The said rescript or judgment, however, raised the issue of the repugnancy of two additional state statutes, chapter 231, sections 113 and 111 of the said General Laws. Prior to the said rescript or judgment, therefore, the appellant had not been afforded an opportunity to place himself of record as to that additional issue.

The appellant accordingly attempted to bring that additional issue before the Supreme Judicial Court by petitions for rehearing in the said two suits. These petitions for rehearing were denied, without opinion.

According to the practice in the Supreme Judicial Court, however, neither petitions for rehearing, nor the action taken thereon become part of the record. The appellant has no remedy, therefore, for placing these additional docu-

ments before this Court, other than through the remedy of this motion.

The Chief Justice of the Supreme Judicial Court of The Commonwealth of Massachusetts has stated to the appellant that, since the said petitions for rehearing and the action taken thereon are not matters of record in his court, it is his opinion that they therefore are not properly matters to be considered by this Court; but that, if this Court should disagree with this opinion, he will gladly submit the said petitions for rehearing and the action taken thereon in response to a simple request from this Court that that be done.

DAVID RINES
RINES AND RINES
Attorneys for the Appellant,
No. Ten Post Office Square,
Boston 9, Massachusetts

Service of copies of the annexed motion to supplement the record, Exhibits A and B referred to therein, and the Memorandum in Support of the said motion is acknowledged this 23rd day of October, 1953.

HARRIS A. REYNOLDS
Assistant Attorney General
Attorney for the Appellees

EXHIBIT A

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

Norfolk, ss.

DAVID RINES, ADMINISTRATOR OF ESTATE OF LUCY L. RINES,
PETITIONER TO ESTABLISH THE TRUTH OF EXCEPTIONS

Plaintiff's Petition to Establish the Truth of Exceptions

To the Honorable the Justices of the Supreme Judicial Court for the Commonwealth:

Respectfully represents your petitioner that he is the plaintiff in a certain action of tort against Armin Klein, brought in and now pending in the Superior Court in and for the County of Norfolk and numbered 42024 on the docket thereof; that said action was tried, with fifteen other cases, before Mr. Justice Kirk and a jury on nineteen days ending February 19, 1948, resulting in verdicts for the plaintiff for $2000. on Count 1 and $6000. on Count 8, said verdicts being entered under leave reserved; that a motion was filed by the defendant for directed verdicts in his favor on both of said counts under the leave reserved, and also a motion for a new trial; that on February 27, 1948, Mr. Justice Kirk allowed the motion for directed verdict as to Count 1 and denied it as to Count 8, and granted the motion for new trial as to Count 8 on grounds 1, 2 and 4 as set forth in the motion; that the plaintiff duly excepted thereto but subsequently waived said Count 8; that on October 3, 1951, Mr. Justice Kirk entered an order for a new trial on said Count 1; that the plaintiff has filed a consolidated bill of exceptions covering many exceptions saved by him during the trial of this and the fifteen other cases, which bill of exceptions has not as yet been acted upon by Mr. Justice Kirk; that the plaintiff duly and seasonably excepted to the order of October 3, 1951 for a new trial on said Count 1 and duly and seasonably, to wit on October 23, 1951, filed his bill of exceptions to said order, and on said day delivered

to Charles J. Dunn, Esquire, attorney of record for the defendant, a written notice of the filing of said bill of exceptions and a copy of said bill; that on January 14, 1952 the plaintiff, by his attorney Lester W. Cooch, Esquire, duly presented said bill of exceptions to Mr. Justice Kirk, and on January 15, 1952 filed in the clerk's office of Norfolk Superior Court an affidavit of the said presentation; that all requirements of law with regard to saving and completing his exception to the said order of October 3, 1951 for a new trial have been complied with by the plaintiff; that, following a hearing on June 20, 1952, Mr. Justice Kirk on the same day took the following action on said bill of exceptions:

> "The within bill of exceptions, hearing having been had on the same on this date, is disallowed because it is not conformable to the truth as to a material matter, and otherwise is not a proper bill of exceptions."

that notice of said action was received by your petitioner on June 25, 1952; that this petition is filed in the full court within twenty days of the receipt of said notice; that a copy of the bill of exceptions is attached hereto marked "A" and is incorporated in and made a part of this petition; that the said bill of exceptions is in conformity with the truth and sets forth a true statement of the pertinent facts and attendant circumstances sufficient to enable the court to determine the question of law raised by said exception; that the plaintiff, your petitioner, is aggrieved by the said order of Mr. Justice Kirk dated June 20, 1952, hereinbefore set forth, disallowing the said bill of exceptions; that before the filing of this petition, your petitioner gave notice thereof to the adverse party by delivering a copy thereof to him or his attorney of record in accordance with Rule 22 of the Rules for the Regulation of Practice Before the Full Court, as appears by the affidavit and oath annexed hereto and marked "B"; that your petitioner has complied with all the requisitions prescribed by said Rule 22;

WHEREFORE your petitioner prays that he may be allowed to establish before this court the truth of the allegations in said bill of exceptions (a copy of which is annexed hereto and marked "A") and the truth of the exceptions presented therein, and thereupon, the truth of the exceptions being established, that they be heard, and the same proceedings taken, as if the exceptions had been duly allowed and entered.

By His Attorney
LESTER W. COOCH

AFFIDAVIT

I, Lester W. Cooch, on oath depose and say that the statements and allegations in the foregoing petition subscribed by me, are true, and that the said bill of exceptions marked "A" conforms to the truth.

LESTER W. COOCH

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss July 9, 1952

Then personally appeared Lester W. Cooch and made oath that the statements and allegations in the foregoing petition to establish the truth of exceptions and the affidavit appended thereto, both of which are subscribed by him, are true, before me

A. VAN ALLEN THOMASON
Notary Public in and for
the Commonwealth of
Massachusetts

My commission expires Oct. 8, 1954

"A"

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss; Superior Court
No. 42024

DAVID RINES, ADMR. OF ESTATE OF LUCY L. RINES

v.

ARMIN KLEIN

Plaintiff's Bill of Exceptions to Order for a New Trial

This action of tort is to recover damages arising from the illness and death of Lucy L. Rines, wife of the plaintiff, of whose estate he is the administrator. This bill of exceptions relates to the order of Mr. Justice Paul G. Kirk dated October 3, 1951 that a new trial be had on Count 1 in this case.

The pleadings on which the case was tried on the merits consisted of a declaration and an answer, each of which is incorporated by reference in this bill of exceptions and may be referred to.

The case was tried with fifteen other cases before Mr. Justice Kirk and a jury at Dedham on 19 days, beginning on January 26, 1948 and ending on February 19, 1948. Dr. Reynald Chase, of New York, was produced by the plaintiff at the trial on the merits. Early in his testimony the judge ruled that he was not qualified to testify. This ruling was later changed and he was permitted to testify. His testimony began on February 11, 1948 and continued, with some interruptions, on the 12th, 13th and 16th. The official transcript of his testimony covers about 230 pages. After all testimony had been taken, the defendants moved

> "that all of the testimony of Dr. Chase, in which he gave opinions that various defendant doctors were guilty of bad practice, be struck from the record, on the ground that it now appears that he is not qualified to express any opinion as to the practice in Boston of doctors specializing in the fields in which the various

doctors have specialized, and that any evidence given by Dr. Chase to the effect that any act of malpractice on the part of any defendant doctor caused proximal damage or death, be stricken from the record, on the ground that on his own testimony he is not competent to express such an opinion."

This motion was denied by Judge Kirk.

During the trial the plaintiff waived Count 3 and the Court directed verdicts for the defendant on Counts 2, 4, 5, 6, 7 and 9.

The Jury returned verdicts as follows:

Count 1, Plaintiff for $2000.00
Count 8, Plaintiff for $6000.00

which verdicts were entered under leave reserved.

Counsel for the defendant, Charles J. Dunn, Esquire, filed a motion for directed verdicts under the leave reserved on Counts 1 and 8, which motion is incorporated in this bill of exceptions by reference and may be referred to, and also a motion for a new trial reading as follows:

Defendant's Motion for a New Trial

Now comes the defendant in the above entitled action and moves the Court after verdict and before judgment to set aside said verdict and grant a new trial and respectfully assigns as reasons therefor the following:

1. The verdict rendered in said case was against the evidence.
2. The verdict rendered in said case was against the evidence and the weight of the evidence.
3. The verdict rendered in said case was against the evidence, the weight of the evidence presented and the law.
4. The damages awarded are excessive.

By his attorney,
(Sgd) Charles J. Dunn

The motion for directed verdict under leave reserved was on February 27, 1948 allowed as to Count 1 and denied as to Count 8, after which the Court entered a verdict for the defendant under the leave reserved as to Count 1.

The Court, on February 27, 1948, took action on the motion for new trial in the following words:

> "Granted as to Count 8, on grounds 1, 2 and 4 as set forth in Motion."

The plaintiff duly excepted thereto.

On May 8, 1950, the plaintiff waived Count 8.

On January 31, 1949, the plaintiff filed his Consolidated Bill of Exceptions of 1171 typewritten pages, covering this case and the 15 other cases with which it was tried. On January 30, 1950 he filed his Substitute Consolidated Bill of Exceptions of 714 typewritten pages, with his motion to substitute it for the bill filed on January 31, 1949. The court, by Mr. Justice Paul G. Kirk, after hearing, denied this motion on January 8, 1951, but granted the plaintiff leave to file on or before May 6, 1951 his Second Substitute Consolidated Bill of Exceptions. At the hearing on this motion Judge Kirk stated that he had taken no action on the motions for new trials and that he did not intend to do so. On May 4, 1951 the plaintiff filed his Second Substitute Consolidated Bill of Exceptions of 272 typewritten pages, with motions that he be permitted to substitute it for the original bill filed on January 31, 1949 and that this last bill be allowed. No hearing has been had and no action has been taken by the court on those motions, although the plaintiff has requested Judge Kirk, both orally and in writing, to set a time for hearing them.

On February 15, 1951 Charles J. Dunn, Esquire, attorney for the defendant, wrote the following letter to Honorable Paul G. Kirk, the judge in this case:

February 15, 1951

Honorable Paul G. Kirk
Superior Court, Suffolk County
Boston, Massachusetts

Re: Rines vs. Armin Klein
Rines vs. Reuben B. Davidoff

Dear Judge:

Sometime ago I received notice from the Massachusetts Medical Society that disciplinary action had been taken by the New York Medical Society against Dr. Reynald H. Chase because of testimony given in the above cases. You will recall that Dr. Chase testified among his qualifications that he did ten deep femoral bi-lateral ligations before 1942. The Committee of Ethics and Discipline of the New York Medical Society gave Dr. Chase an opportunity to substantiate the truth of this testimony together with other statements he had made before you at the trial. They were found to be wholly false, no basis in fact or truth and, although I have not been informed of the precise penalty, I know some disciplinary measures were adopted.

In view of the above, I should like to renew the motions for new trial which I filed and which you still have not acted upon, namely David Rines, Admr. vs. Reuben Davidoff on Counts I and V and David Rines, Admr. vs. Armin Klein on Count I.

I have notified all counsel by sending them a copy of this letter.

Very truly yours,

CHARLES J. DUNN

CJD:W

On February 26, 1951, the plaintiff's attorney, Lester W. Cooch, Esquire, was notified by direction of Judge Kirk that the latter wished to see him and Mr. Dunn

> "to discuss the matters of Mr. Dunn's recent letter . . . the purpose of which is to prepare the ground for a formal hearing of the matters".

Action on this matter was postponed owing to Mr. Cooch's absence.

On June 5, 1951, Judge Kirk requested Mr. Cooch to inform Mr. Dunn that he wished to see them for a preliminary hearing to discuss Mr. Dunn's letter for the purpose of making arrangements for a formal hearing, allowing time to have witnesses come from New York, if deemed necessary. On June 12, 1951, Mr. Dunn informed Mr. Cooch that Judge Kirk had set June 25, 1951 at 4:00 p.m. in the Judges' Lobby of Suffolk Court House for seeing them in this connection.

The Plaintiff, a member of the Massachusetts Bar in good standing, requested of Judge Kirk that he be allowed to be present at this hearing, to which the Judge replied by a letter to Mr. Cooch dated June 14, 1951, as follows:

> "I have your letter wherein you request that Mr. Rines be present at the conference set down by me amongst counsel, in the above cases. So far as these cases are concerned, Mr. Rines is not a member of the Bar, but is a party plaintiff. He will not be permitted to be present."

On June 20, 1951, Mr. Rines duly entered his appearance as attorney for the plaintiff in this case and in the 15 other cases with which it was tried.

On June 25, 1951, Mr. Cooch and Mr. Dunn presented themselves at the Judges' Lobby and were ushered into a small hearing room. At 3:57 p.m. Judge Kirk entered whereupon the following colloquy occurred, in substance:

> Mr. Cooch: Your Honor, Mr. Rines is coming up.
>
> Judge Kirk: I gave you your instructions on that. He is not coming in.
>
> Mr. Cooch: There has been a little change since then. Mr. Rines has entered his appearances in each case and is now a counsel of record.
>
> Judge Kirk: I don't care whether or not he has entered appearances or what he has done, he is not going to be present at this conference and I told you so.

The judge then asked Mr. Dunn to state "what he had to say regarding the undisposed motions for new trials."

Mr. Dunn, who had some papers in front of him, said in substance the following to the judge:

> "You will recall that I wrote you last February. I am sure that you probably expected me to come here with affidavits and things of that kind. I have not got them and I think I can tell you why. Sometime ago the Massachusetts Medical Society informed me that the New York Medical Society had taken disciplinary action against Dr. Chase because of perjury before you when these cases were tried. It seems, however, that they are or were not able to furnish affirmative proof, but they could find no record of any deep femoral ligations having been performed by Dr. Chase."

The Judge interrupted by saying "Before 1942 do you mean?" Mr. Dunn said:

> "Yes. I have received this information from a doctor who I think is Dr. Gallupe and I expect that it can be called negative. I sent my brother John to New York to check it up, but he was unable to find anything to show that these operations had been performed by Dr. Chase. Possibly this may be accounted for by the fact that I understand that Dr. Chase did not cooperate by giving the names of the patients so that the records could be examined."

At this point the Court messenger opened the door and said to Judge Kirk: "Mr. Rines is here". The judge then rose and pointing his finger at Mr. Cooch said: "You go out and tell Mr. Rines that he is not going to come in here. Also, I want you to understand that there is to be no coming and going about it, it is final. Tell him that." Mr. Cooch did as instructed, and while doing so the Judge came out of the room and walked down the hall. Mr. Rines then entered the room and sat down, followed by Mr. Cooch. In a few minutes the judge returned. Standing near the entrance door he looked at Mr. Rines and said: "How do you do

Mr. Rines. Are you going to be in here?" Mr. Rines replied: "Judge Kirk, I want to talk with you. I want to inquire why you are keeping me out." Judge Kirk then said: "Gentlemen, the hearing is cancelled" and walked out.

The following day, June 26, 1951, Mr. Cooch received a telephone message at his home in Abington at 1:10 p.m. that Judge Kirk wanted to see him in the Judges' Lobby in Boston at 2:00 p.m. Upon his arrival directly from his home, both he and Mr. Dunn were ushered into the same hearing room. Judge Kirk entered and the following colloquy immediately occurred, in substance:

Judge Kirk: "This is all that will be here today".

Mr. Cooch: "Did Mr. Eckert deliver to you my message that I had followed your instructions of yesterday explicitly?"

Judge Kirk: "That was the most contemptible thing I have ever seen, and most reprehensible on your part."

Mr. Cooch: "What do you mean by 'reprehensible' on my part?"

Judge Kirk: "That entry of appearances by Mr. Rines was just a subterfuge on your part to get around instructions which I had given you. It won't work with me."

Mr. Cooch: "I wrote you some time ago that Mr. Rines demanded to be present and I assume he has a perfect right to enter his appearances and be a counsel of record."

Judge Kirk: "I consider it a subterfuge. Most lawyers are able to control their clients."

Mr. Cooch: "Mr. Rines is not only a client, but a co-attorney."

Judge Kirk: "I have seen many lawyers of equal or greater stature than you withdraw their appearances if their advice is not taken." (Pause) "I don't say that you ought to withdraw your appearances, but I still consider this a subterfuge."

Judge Kirk: "I think Mr. Dunn should have an opportunity to proceed with what he was saying before he was so rudely interrupted yesterday. For the pur-

pose of refreshing my recollection I want to be sure I understand the strategy of Mr. Schloss (the plaintiff's trial attorney) in presenting his case. Did he put the doctors on first and Dr. Chase last?"

Mr. Cooch: "I have no records with me, but I think he interspersed lay witnesses between the doctors, and that Dr. Chase was the last plaintiff's witness, unless possibly Mr. Rines came after him."

Mr. Dunn then proceeded, saying that "Dr. Chase was a liar, a perjurer, a bum and one who for plenty of money came to Boston to give false testimony. You know that this is so Judge, because in your charge you called him a charlatan". The judge made no reply of any kind to that remark.

Mr. Dunn then continued in substance that he had sent his brother John to New York, but that he had been unable, while there, to obtain any information from the hospitals showing that Dr. Chase had performed the operations about which he testified; that if Dr. Chase were on the level, he would not have withheld such vital information; that the information that he, Mr. Dunn, had came from the Massachusetts Medical Society; that he did not know whether or not Dr. Chase had been disciplined in New York, but he felt very sure that he had been; that that Society in New York was not able to corroborate the doctor's testimony in Dedham and that it had decided that the testimony was wholly false; that he, Mr. Dunn, had no information about any disciplinary action, but that he was sure something had been done along that line.

Mr. Dunn did not show to the Judge or to Mr. Cooch any letters, affidavits, or papers of any kind. He also stated that he did not consider or intend to treat the matters which he had covered in his remarks as newly-discovered evidence; that he did not intend to file any motions based on newly-discovered evidence; and that he agreed that whatever consideration is given or action taken on his request for new trial is to be limited to the motions already filed and the grounds which were listed in them.

No motion for new trial has been filed in this case, except the one previously referred to, and no affidavits of newly-discovered evidence have been filed.

The next day, June 27, 1951, Mr. Cooch wrote Judge Kirk a letter, excerpts from which, and which correctly state the facts, follow:

> "My reasons for contending that you do not at this time allow in whole or in part Mr. Dunn's motions for new trials in the Klein and Davidoff cases are:
>
> 1. It would be inconsistent with the action you have taken on the motions for directed verdicts under the leave reserved.
>
> 2. All verdicts already are for the defendants. What more would they gain by new trials? It would mean great expenditures of time and money, and the defendants might even get verdicts against them.
>
> 3. Mr. Dunn stated before you yesterday that he is not urging any newly-discovered evidence, and that he is not going to file any new motions based on that ground. Such motions, if filed, should be accompanied by affidavits, copies of which should be furnished the plaintiff so that he may have some knowledge of what is contended and have an opportunity to prepare his defense thereto at a hearing on the motions.
>
> 4. The matter therefore is limited to the motions already filed and the grounds set forth therein.
>
> 5. What is now urged by Mr. Dunn was brought out at length at the trial, including the vituperations made by him before you yesterday. The evidence which the jury had before it, and on which it properly could act, included all that Mr. Dunn now asserts, and more. The verdicts were not against that evidence, or the weight of it, or the law.
>
> 6. Despite Mr. Dunn's statement to the contrary, what he is really insisting upon now is newly-discovered matter. This is not open to him as the record now stands.

7. Assuming, but not admitting, that it is shown to you that Dr. Chase committed perjury at the trial, I contend that that point was stressed at the trial and considered by the jury.

8. Finally, what have you before you now as a result of the hearing, or conference, that you did not know before? Mr. Dunn offered nothing either factual or affirmative. He read from, or paraphrased, extracts of letters which he or someone else received, and said that his brother could find no records in New York sustaining Dr. Chase, partly, if not wholly, because Dr. Chase did not furnish the names of his patients. There was nothing offered you except negative hearsay by persons obviously greatly prejudiced. Mr. Dunn did not even show the letters to you or even read their entire contents. Mr. Dunn's letter to you February 15, 1951 said in effect merely that the Massachusetts Medical Society notified him that disciplinary action (the nature of which Mr. Dunn admits he does not know) has been taken by the New York Medical Society against Dr. Chase because of the testimony given by the doctor in the trial of our cases. Apparently that Society "gave Dr. Chase an opportunity to substantiate the truth of this testimony together with other statements he made before you at the trial". From what I can glean from Mr. Dunn's remarks, Dr. Chase did not discuss that testimony with the New York Society or give it the names of his patients. So that Society found Dr. Chase's testimony "to be wholly false, no basis in fact or truth", with some suggestions of a penalty of which Mr. Dunn disclaims knowledge! This is pretty thin material on which to base such a serious charge or to urge you to take such drastic measures at this stage, even admitting for this purpose only, that such action can now be taken on the record and material which you have before you."

Nothing further happened until Judge Kirk on October 3, 1951 entered an order for a new trial on Count 1 in this case. The said order is as follows:

Order of Court on Motion For New Trial

1. This is one of 16 cases, embracing 107 counts (subsequently reduced to 79 counts) brought by the plaintiff individually or in his capacity as administrator of his wife's estate, against the Beth Israel Hospital and numerous physicians, surgeons and nurses who attended his wife or acted as consultants during her illness.

2. The trial lasted 17 trial days.

3. The last witness for the plaintiff, and the last principal witness in the case was one Dr. Reynald H. Chase of New York who was presented to give expert opinion testimony. I initially ruled that Dr. Chase was not qualified, but on the same day, following the noon recess changed my ruling and permitted him to testify. I had grave doubts as to Dr. Chase's qualifications. In permitting Dr. Chase to testify, I was influenced, among other considerations, by the following:—the known difficulty which plaintiffs have in procuring expert witnesses in malpractice cases; the prospect that a wiser determination of his qualifications could be made after he had testified at length; the many days already expended in the trial of the cases; and the prospect that the verdicts of the jury would finally dispose of most, if not all, of the litigation.

4. I am entirely satisfied that Dr. Chase did not have the surgical experience which he testified he did have; that he was not qualified to give expert opinion testimony in these cases; that my ruling permitting him to testify was a mistake; that this mistake was the substantial if not the sole factor in producing verdicts for the plaintiff in four of the eighteen counts which were submitted to the jury; that these verdicts represent a miscarriage of justice.

5. It is therefore ordered that a new trial be had on Count 1 in the above case on the ground that the verdict is against the weight of the evidence.

Paul G. Kirk
Justice of the Superior Court

October 3, 1951

The plaintiff duly excepted to this order for new trial on Count 1 and filed with the clerk, within the required three days after the receipt from the clerk of notice thereof, his exceptions in writing, as follows:

PLAINTIFF'S CLAIM OF EXCEPTIONS TO THE ORDER OF THE COURT ON MOTION FOR NEW TRIAL

Now comes the plaintiff having on October 5, 1951 received notice from the clerk of the order of Mr. Justice Paul G. Kirk dated October 3, 1951 that a new trial be had on count 1 in the above case on the ground that the verdict is against the weight of the evidence, and, being aggrieved thereby, claims an exception therefrom to the Supreme Judicial Court.

By his attorney,
LESTER W. COOCH

This bill of exceptions contains all the evidence and facts material to the exceptions alleged.

The plaintiff, being aggrieved by the action of the Court in ordering a new trial on Count 1 in this case, exceptions to which were duly taken by him as hereinbefore set forth, files this, his bill of exceptions and prays that the same may be allowed.

DAVID RINES
Administrator of the
Estate of Lucy L. Rines

By LESTER W. COOCH
His Attorney

"B"

Affidavit

I, Lester W. Cooch, attorney of record for the petitioner, on oath depose and say that on July 10, 1952, before the filing of this petition, I delivered in hand to Charles J. Dunn, Esquire, attorney of record for the adverse party, Armin Klein, a full and complete copy of this petition to establish the truth of exceptions, including all affidavits, oaths and signatures which were a part thereof, and at the same time I delivered in hand to him a letter of which the following is a true copy:

July 10, 1952

Charles J. Dunn, Esq.
908 Barristers Hall
Boston, Massachusetts

re: Rines, admr. vs. Klein

Dear Mr. Dunn:

This is to notify you that, after delivering this notice and copy of petition to you, I shall file in the clerk's office of the full court of the Supreme Judicial Court for the Commonwealth, the original of the petition of David Rines, administrator of the estate of Lucy L. Rines, to establish the truth of his exceptions to the order of Judge Kirk dated October 3, 1951 for a new trial as to Count 1, the copy of which petition I am now delivering to you being an exact copy thereof.

LESTER W. COOCH

Attorney for David Rines Admr. of estate of Lucy L. Rines, petitioner.

LESTER W. COOCH

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. July 10, 1952

Then personally appeared Lester W. Cooch, and made oath that the statements contained in the foregoing affidavit subscribed by him, are true, before me.

HARRISON D. MASON
Notary Public in and for
the Commonwealth of
Massachusetts
My commission expires Feb. 10, 1956

A true copy, of petition and order of court thereon.

Attest,

FREDERICK L. QUINLAN
Clerk

(SEAL)

After hearing, petition dismissed on ground that exceptions do not appear meritorious.

Signed: STANLEY E. QUA,
Chief Justice.

Filed July 10, 1952
Attest: FREDERICK L. QUINLAN,
Clerk.

EXHIBIT B

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

Norfolk, ss

DAVID RINES, ADMINISTRATOR OF ESTATE OF LUCY L. RINES, PETITIONER TO ESTABLISH THE TRUTH OF EXCEPTIONS

Plaintiff's Petition to Establish the Truth of Exceptions

To the Honorable the Justices of the Supreme Judicial Court for the Commonwealth:

Respectfully represents your petitioner that he is the plaintiff in a certain action of tort against Reuben B. Davidoff, brought in and now pending in the Superior Court in and for the County of Norfolk and numbered 42028 in the docket thereof; that said action was tried, with fifteen other cases, before Mr. Justice Kirk and a jury on nineteen days ending February 19, 1948, resulting in verdicts for the plaintiff for $2000. on Count 1 and $5000. on Count 5, and for the defendant on Count 8, which said plaintiff's verdicts were entered under leave reserved; that a motion was filed by the defendant for directed verdicts in his favor on both of said counts 1 and 5 under the leave reserved, and also a motion for a new trial; that on February 27, 1948 Mr. Justice Kirk allowed the motion for directed verdicts as to Counts 1 and 5, and took no action on the motion for new trial; that the plaintiff duly excepted thereto; that on October 3, 1951, Mr. Justice Kirk entered an order for a new trial on said Counts 1 and 5; that the plaintiff has filed a consolidated bill of exceptions covering many exceptions saved by him during the trial of this and fifteen other cases, which bill of exceptions has not as yet been acted upon by Mr. Justice Kirk; that the plaintiff duly and seasonably excepted to the order of October 3, 1951 for a new trial on said Counts 1 and 5 and duly and seasonably, to wit on October 23, 1951, filed his bill of exceptions to said order, and on

said day delivered to Charles J. Dunn, Esquire, attorney of record for the defendant, a written notice of the filing of said bill of exceptions and a copy of said bill; that on January 14, 1952 the plaintiff, by his attorney Lester W. Cooch, Esquire, duly presented said bill of exceptions to Mr. Justice Kirk, and on January 15, 1952 filed in the clerk's office of Norfolk Superior Court an affidavit of the said presentation; that all requirements of law with regard to saving and completing his exception to the said order of October 3, 1951 for a new trial have been complied with by the plaintiff; that, following a hearing on June 20, 1952, Mr. Justice Kirk on the same day took the following action on said bill of exceptions:

> "The within bill of exceptions, hearing having been had on the same on this date, is disallowed because it is not conformable to the truth as to a material matter, and otherwise is not a proper bill of exceptions."

that notice of said action was received by your petitioner on June 25, 1952; that this petition is filed in the full court within twenty days of the receipt of said notice; that a copy of the bill of exceptions is attached hereto marked "A" and is incorporated in and made a part of this petition; that the said bill of exceptions is in conformity with the truth and sets forth a true statement of the pertinent facts and attendant circumstances sufficient to enable the court to determine the question of law raised by said exception; that the plaintiff, your petitioner, is aggrieved by the said order of Mr. Justice Kirk dated June 20, 1952, hereinbefore set forth, disallowing the said bill of exceptions; that before the filing of this petition, your petitioner gave notice thereof to the adverse party by delivering a copy thereof to him or his attorney of record in accordance with Rule 22 of the Rules for the Regulation of Practice Before the Full Court, as appears by the affidavit and oath annexed hereto and marked "B"; that your petitioner has complied with all the requisitions prescribed by said Rule 22;

WHEREFORE your petitioner prays that he may be allowed to establish before this court the truth of the allegations in said bill of exceptions (a copy of which is annexed hereto and marked "A") and the truth of the exceptions presented therein, and thereupon, the truth of the exceptions being established, that they be heard, and the same proceedings taken, as if the exceptions had been duly allowed and entered.

By His Attorney
LESTER W. COOCH

AFFIDAVIT

I, Lester W. Cooch, on oath depose and say that the statements and allegations in the foregoing petition subscribed by me, are true, and that the said bill of exceptions marked "A" conforms to the truth.

LESTER W. COOCH

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss July 9, 1952

Then personally appeared Lester W. Cooch and made oath that the statements and allegations in the foregoing petition to establish the truth of exceptions and the affidavit appended thereto, both of which are subscribed by him, are true, before me

A. VAN ALLEN THOMASON
Notary Public in and for
the Commonwealth of
Massachusetts

My commission expires Oct. 8, 1954

"A"

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss. Superior Court
No. 42028

DAVID RINES, ADMR. OF ESTATE OF LUCY L. RINES

v.

REUBEN B. DAVIDOFF

Plaintiff's Bill of Exceptions to Order for New Trial

This action of tort is to recover damages arising from the illness and death of Lucy L. Rines, wife of the plaintiff, of whose estate he is the administrator. This bill of exceptions relates to the order of Mr. Justice Paul G. Kirk dated October 3, 1951, that a new trial be had on Counts 1 and 5 in this case.

The pleadings on which the case was tried on the merits consisted of a declaration and an answer, each of which is incorporated by reference in this bill of exceptions and may be referred to.

The case was tried with 15 other cases before Mr. Justice Kirk and a jury at Dedham on 19 days, beginning on January 26, 1948 and ending on February 19, 1948. Dr. Reynald H. Chase, of New York, was produced by the plaintiff at the trial on the merits. Early in his testimony the judge ruled that he was not qualified to testify. This ruling was later changed and he was permitted to testify. His testimony began February 11, 1948 and continued, with some interruptions, on the 12th, 13th and 16th. The official transcript of his testimony covers about 230 pages. After all testimony had been taken, the defendants moved

> "that all of the testimony of Dr. Chase, in which he gave opinions that various defendant doctors were guilty of bad practice, be struck from the record, on the ground that it now appears that he is not qualified to express any opinion as to the practice in Boston of doctors specializing in the fields in which the various

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doctors have specialized, and that any evidence given by Dr. Chase to the effect that any act of malpractice on the part of any defendant doctor caused proximal damage or death, be stricken from the record, on the ground that on his own testimony he is not competent to express such an opinion."

This motion was denied by Judge Kirk.

During the trial the plaintiff waived Count 3 and the Court directed verdicts for the defendant on Counts 2, 4, 6 and 7.

The jury returned verdicts as follows:

Count 1, Plaintiff for $2000.00
Count 5, Plaintiff for $5000.00
Count 8, for the defendant.

which plaintiff's verdicts were entered under leave reserved.

Counsel for the defendant, Charles J. Dunn, Esquire, filed a motion for directed verdicts under the leave reserved on Counts 1 and 5, which motion is incorporated in this bill of exceptions by reference and may be referred to, and also a motion for a new trial reading as follows:

Defendant's Motion for a New Trial

Now comes the defendant in the above entitled action and moves the Court after verdict and before judgment to set aside said verdict and grant a new trial and respectfully assigns as reasons therefor the following:

1. The verdict rendered in said case was against the evidence.
2. The verdict rendered in said case was against the evidence and the weight of the evidence.
3. The verdict rendered in said case was against the evidence, the weight of the evidence presented and the law.
4. The damages awarded are excessive.

By his attorney,
(Sgd) Charles J. Dunn

The motion for directed verdict under leave reserved was on February 27, 1948 allowed as to Counts 1 and 5, after which the court entered a verdict for the defendant under the leave reserved as to said Counts 1 and 5.

The court took no action on the motion for new trial.

On January 31, 1949 the plaintiff filed his Consolidated Bill of Exceptions of 1171 typewritten pages, covering this case and the 15 other cases with which it was tried. On January 30, 1950 he filed his Substitute Consolidated Bill of Exceptions of 714 typewritten pages, with his motion to substitute it for the bill filed on January 31, 1949. The Court, by Mr. Justice Paul G. Kirk, after hearing, denied this motion on January 8, 1951, but granted the plaintiff leave to file on or before May 6, 1951 his Second Substitute Consolidated Bill of Exceptions. At the hearing on this motion Judge Kirk stated that he had taken no action on the motions for new trials and that he did not intend to do so. On May 4, 1951 the plaintiff filed his Second Substitute Consolidated Bill of Exceptions of 272 typewritten pages, with motions that he be permitted to substitute it for the original bill filed on January 31, 1949, and that this last bill be allowed. No hearing has been had and no action has been taken by the court on those motions, although the plaintiff has requested Judge Kirk, both orally and in writing, to set a time for hearing them.

On February 15, 1951 Charles J. Dunn, Esquire, attorney for the defendant, wrote the following letter to Honorable Paul G. Kirk, the judge in this case:

February 15, 1951

Honorable Paul G. Kirk
Superior Court, Suffolk County
Boston, Massachusetts

Re: Rines vs. Armin Klein
Rines vs. Reuben B. Davidoff

Dear Judge:

Sometime ago I received notice from the Massachusetts Medical Society that disciplinary action had been

taken by the New York Medical Society against Dr. Reynald H. Chase because of testimony given in the above cases. You will recall that Dr. Chase testified among his qualifications that he did ten deep femoral bi-lateral ligations before 1942. The Committee of Ethics and Discipline of the New York Medical Society gave Dr. Chase an opportunity to substantiate the truth of this testimony together with other statements he had made before you at the trial. They were found to be wholly false, no basis in fact or truth and, although I have not been informed of the precise penalty, I know some disciplinary measures were adopted.

In view of the above, I should like to renew the motions for new trial which I filed and which you still have not acted upon, namely David Rines, Admr. vs. Reuben Davidoff on Counts I and V and David Rines, Admr. vs. Armin Klein on Count I.

I have notified all counsel by sending them a copy of this letter.

Very truly yours,

CHARLES J. DUNN

CJD:W

On February 26, 1951, the plaintiff's attorney, Lester W. Cooch, Esquire, was notified by direction of Judge Kirk that the latter wished to see him and Mr. Dunn "to discuss the matters of Mr. Dunn's recent letter—the purpose of which is to prepare the ground for a formal hearing of the matter". Action on this matter was postponed owing to Mr. Cooch's absence.

On June 5, 1951, Judge Kirk requested Mr. Cooch to inform Mr. Dunn that he wished to see them for a preliminary hearing to discuss Mr. Dunn's letter for the purpose of making arrangements for a formal hearing, allowing time to have witnesses come from New York, if deemed necessary. On June 12, 1951, Mr. Dunn informed Mr. Cooch that Judge Kirk had set June 25, 1951 at 4:00 p.m. in the Judges' Lobby of Suffolk Court House for seeing them in this connection.

The plaintiff, a member of the Massachusetts Bar in good standing, requested of Judge Kirk that he be allowed to be present at this hearing, to which the judge replied by a letter to Mr. Cooch dated June 14, 1951 as follows:

> "I have your letter wherein you request that Mr. Rines be present at the conference set down by me amongst counsel, in the above cases. So far as these cases are concerned, Mr. Rines is not a member of the Bar, but is a party plaintiff. He will not be permitted to be present."

On June 20, 1951, Mr. Rines duly entered his appearances as attorney for the plaintiff in this case and in the 15 other cases with which it was tried.

On June 25, 1951, Mr. Cooch and Mr. Dunn presented themselves at the Judges' Lobby and were ushered into a small hearing room. At 3:57 p.m. Judge Kirk entered whereupon the following colloquy occurred, in substance:

> Mr. Cooch: Your Honor, Mr. Rines is coming up.
>
> Judge Kirk: I gave you your instructions on that. He is not coming in.
>
> Mr. Cooch: There has been a little change since then. Mr. Rines has entered his appearances in each case and is now a counsel of record.
>
> Judge Kirk: I don't care whether or not he has entered appearances or what he has done, he is not going to be present at this conference and I told you so.

The Judge then asked Mr. Dunn to state "what he had to say regarding the undisposed motions for new trials."

Mr. Dunn, who had some papers in front of him, said in substance the following to the Judge:

> "You will recall that I wrote you last February. I am sure that you probably expected me to come here with affidavits and things of that kind. I have not got them and I think I can tell you why. Sometime ago the Massachusetts Medical Society informed me that the New York Medical Society had taken disciplinary

action against Dr. Chase because of perjury before you when these cases were tried.

It seems, however, that they are or were not able to furnish affirmative proof, but they could find no record of any deep femoral ligations having been performed by Dr. Chase."

The Judge interrupted by saying "Before 1942 do you mean?" Mr. Dunn said

"Yes. I have received this information from a doctor who I think is Dr. Gallupe and I expect that it can be called negative. I sent my brother John to New York to check it up, but he was unable to find anything to show that these operations had been performed by Dr. Chase. Possibly this may be accounted for by the fact that I understand Dr. Chase did not cooperate by giving the names of the patients so that the records could be examined."

At this point the Court messenger opened the door and said to Judge Kirk: "Mr. Rines is here". The judge then rose and pointing his finger at Mr. Cooch said: "You go out and tell Mr. Rines that he is not going to come in here. Also, I want you to understand there is to be no coming and going about it, it is final. Tell him that". Mr. Cooch did as instructed, and while doing so the judge came out of the room and walked down the hall. Mr. Rines then entered the room and sat down, followed by Mr. Cooch. In a few minutes the judge returned. Standing near the entrance door he looked at Mr. Rines and said: "How do you do, Mr. Rines. Are you going to be in here?" Mr. Rines replied: "Judge Kirk, I want to talk with you. I want to inquire why you are keeping me out." Judge Kirk then said: "Gentlemen, the hearing is cancelled" and walked out.

The following day, June 26, 1951, Mr. Cooch received a telephone message at his home in Abington at 1:10 p.m. that Judge Kirk wanted to see him in the Judges' Lobby in

Boston at 2:00 p.m. Upon his arrival directly from his home, both he and Mr. Dunn were ushered into the same hearing room. Judge Kirk entered and the following colloquy immediately occurred, in substance:

Judge Kirk: This is all that will be here today.

Mr. Cooch: Did Mr. Eckert deliver to you my message that I had followed your instructions of yesterday explicitly?

Judge Kirk: That was the most contemptible thing I have ever seen, and most reprehensible on your part.

Mr. Cooch: What do you mean by 'reprehensible' on my part?

Judge Kirk: That entry of appearances by Mr. Rines was just a subterfuge on your part to get around instructions which I had given you. It won't work with me.

Mr. Cooch: I wrote you some time ago that Mr. Rines demanded to be present and I assume he has a perfect right to enter his appearances and be a counsel of record.

Judge Kirk: I consider it a subterfuge. Most lawyers are able to control their clients.

Mr. Cooch: Mr. Rines is not only a client, but a co-attorney.

Judge Kirk: I have seen many lawyers of equal or greater stature than you withdraw their appearances if their advice is not taken. (pause) I don't say that you ought to withdraw your appearances, but I still consider this a subterfuge.

Judge Kirk: I think Mr. Dunn should have an opportunity to proceed with what he was saying before he was so rudely interrupted yesterday. For the purpose of refreshing my recollection I want to be sure I understand the strategy of Mr. Schloss (the plaintiff's trial attorney) in presenting his case. Did he put the doctors on first and Dr. Chase last?

Mr. Cooch: I have no records with me, but I think he interspersed lay witnesses between the doctors, and that Dr. Chase was the last plaintiff's witness, unless possibly Mr. Rines came after him.

Mr. Dunn then proceeded, saying that "Dr. Chase was a liar, a perjurer, a bum and one who for plenty of money came to Boston to give false testimony. You know that this is so Judge, because in your charge you called him a charlatan." The judge made no reply of any kind to that remark.

Mr. Dunn then continued in substance that he had sent his brother John to New York, but that he had been unable, while there, to obtain any information from the hospitals showing that Dr. Chase had performed the operations about which he testified; that if Dr. Chase were on the level, he would not have withheld such vital information; that the information that he, Mr. Dunn, had came from the Massachusetts Medical Society; that he did not know whether or not Dr. Chase had been disciplined in New York, but he felt very sure that he had been; that that Society in New York was not able to corroborate the doctor's testimony in Dedham and that it had decided that the testimony was wholly false; that he, Mr. Dunn, had no information about any disciplinary action, but he was sure something had had been done along that line.

Mr. Dunn did not show to the Judge or to Mr. Cooch any letters, affidavits, or papers of any kind. He also stated that he did not consider or intend to treat the matters which he had covered in his remarks as newly-discovered evidence; that he did not intend to file any motions based on newly-discovered evidence; and that he agreed that whatever consideration is given or action taken on his request for new trial is to be limited to the motions already filed and the grounds which were listed in them.

No motion for new trial has been filed in this case, except the one previously referred to, and no affidavits of newly-discovered evidence have been filed.

The next day June 27, 1951, Mr. Cooch wrote Judge Kirk a letter, excerpts from which, and which correctly state the facts, follow:

"My reasons for contending that you do not at this time allow in whole or in part Mr. Dunn's motions for new trials in the Klein and Davidoff cases are:

1. It would be inconsistent with the action you have taken on the motions for directed verdicts under the leave reserved.

2. All verdicts already are for the defendants. What more would they gain by new trials? It would mean great expenditures of time and money, and the defendants might even get verdicts against them.

3. Mr. Dunn stated before you yesterday that he is not urging any newly-discovered evidence, and that he is not going to file any new motions based on that ground. Such motions, if filed, should be accompanied by affidavits, copies of which should be furnished the plaintiff so that he may have some knowledge of what is contended and have an opportunity to prepare his defense thereto at a hearing on the motions.

4. The matter therefore is limited to the motions already filed and the grounds set forth therein.

5. What is now urged by Mr. Dunn was brought out at length at the trial, including the vituperations made by him before you yesterday. The evidence which the jury had before it, and on which it properly could act, included all that Mr. Dunn now asserts, and more. The verdicts were not against that evidence, or the weight of it, or the law.

6. Despite Mr. Dunn's statement to the contrary, what he is really insisting upon now is newly-discovered matter. This is not open to him as the record now stands.

7. Assuming, but not admitting, that it is shown to you that Dr. Chase committed perjury at the trial, I contend that that point was stressed at the trial and considered by the jury.

8. Finally, what have you before you now as a result of the hearing, or conference, that you did not know before? Mr. Dunn offered nothing either factual or affirmative. He read from, or paraphrased, extracts

of letters which he or some one else received, and said that his brother could find no records in New York sustaining Dr. Chase, partly, if not wholly, because Dr. Chase did not furnish the names of his patients. There was nothing offered you except negative hearsay by persons obviously greatly prejudiced. Mr. Dunn did not even show the letters to you, or even read their entire contents. Mr. Dunn's letter to you February 15, 1951 said in effect merely that the Massachusetts Medical Society notified him that disciplinary action (the nature of which Mr. Dunn admits he does not know) has been taken by the New York Medical Society against Dr. Chase because of the testimony given by the doctor in the trial of our cases. Apparently that Society "gave Dr. Chase an opportunity to substantiate the truth of this testimony together with other statements he made before you at the trial." From what I can glean from Mr. Dunn's remarks, Dr. Chase did not discuss that testimony with the New York Society or give it the names of his patients. So that Society found Dr. Chase's testimony, "to be wholly false, no basis in fact or truth", with some suggestions of a penalty, of which Mr. Dunn disclaims knowledge! This is pretty thin material on which to base such a serious charge or to urge you to take such drastic measures at this stage, even admitting for this purpose only, that such action can now be taken on the record and material which you have before you."

Nothing further happened until Judge Kirk on October 3, 1951 entered an order for a new trial on Counts 1 and 5 in this case. The said order is as follows:

ORDER OF COURT ON MOTION FOR NEW TRIAL

1. This is one of 16 cases, embracing 107 counts (subsequently reduced to 79 counts) brought by the plaintiff individually or in his capacity as administrator of his wife's estate, against the Beth Israel Hospital and numerous physicians, surgeons and nurses who attended his wife or acted as consultants during her illness.

2. The trial lasted 17 trial days.

3. The last witness for the plaintiff, and the last principal witness in the case, was one Dr. Reynald H. Chase of New York who was presented to give expert opinion testimony. I initially ruled that Dr. Chase was not qualified, but on the same day, following the noon recess, changed my ruling and permitted him to testify. I had grave doubts as to Dr. Chase's qualifications. In permitting Dr. Chase to testify, I was influenced, among other considerations, by the following:—the known difficulty which plaintiffs have in procuring expert witnesses in malpractice cases; the prospect that a wiser determination of his qualifications could be made after he had testified at length; the many days already expended in the trial of the cases; and the prospect that the verdicts of the jury would finally dispose of most, if not all, of the litigation.

4. I am entirely satisfied that Dr. Chase did not have the surgical experience which he testified he did have; that he was not qualified to give expert opinion testimony in these cases; that my ruling permitting him to testify was a mistake; that this mistake was the substantial if not the sole factor in producing verdicts for the plaintiff in four of the eighteen counts which were submitted to the jury; and that these verdicts represent a miscarriage of justice.

5. It is therefore ordered that a new trial be had on Counts 1 and 5 in the above case on the ground that verdicts thus returned are against the weight of the evidence.

(Sgd) Paul G. Kirk
Justice of the Superior Court.

October 3, 1951

The plaintiff duly excepted to this order for new trial on Counts 1 and 5 and filed with the clerk, within the required three days after the receipt from the clerk of notice thereof, his exceptions in writing, as follows:

PLAINTIFF'S CLAIM OF EXCEPTIONS TO THE ORDER OF THE COURT ON MOTION FOR NEW TRIAL

Now comes the plaintiff, having on October 5, 1951 received notice from the clerk of the order of Mr. Justice Paul G. Kirk dated October 3, 1951 that a new trial be had on Counts 1 and 5 in the above case on the ground that the verdict is against the weight of the evidence, and, being aggrieved thereby, claims an exception therefrom to the Supreme Judicial Court.

By his attorney
LESTER W. COOCH

This bill of exceptions contains all the evidence and facts material to the exceptions alleged.

The plaintiff, being aggrieved by the action of the Court in ordering a new trial on Counts 1 and 5 in this case, exceptions to which were duly taken by him as hereinbefore set forth, files this, his bill of exceptions and prays that the same may be allowed.

DAVID RINES,
Administrator of the Estate of Lucy L. Rines

By LESTER W. COOCH
His Attorney

"B"

Affidavit

I, Lester W. Cooch, attorney of record for the petitioner, on oath depose and say that on July 10, 1952, before the filing of this petition, I delivered in hand to Charles J. Dunn, Esquire, attorney of record for the adverse party, Reuben B. Davidoff, a full and complete copy of this petition to establish the truth of exceptions, including all affidavits, oaths and signatures which were a part thereof, and at the same time I delivered in hand to him a letter of which the following is a true copy:

Charles J. Dunn, Esq.
908 Barristers Hall
Boston, Massachusetts

July 10, 1952

Re: Rines, admr. vs. Davidoff

Dear Mr. Dunn:

This is to notify you that, after delivering this notice and copy of petition to you, I shall file in the clerk's office of the full court of the Supreme Judicial Court for the Commonwealth, the original of the petition of David Rines, administrator of the estate of Lucy L. Rines, to establish the truth of his exceptions to the order of Judge Kirk dated October 3, 1951 for a new trial as to Counts 1 and 5, a copy of which petition I am now delivering to you being an exact copy thereof.

LESTER W. COOCH
Attorney for David Rines, Admr. of estate of Lucy L. Rines, petitioner.

LESTER W. COOCH

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. July 10, 1952

Then personally appeared Lester W. Cooch, and made oath that the statements contained in the foregoing affidavit subscribed by him, are true, before me

HARRISON D. MASON
Notary Public in and for
the Commonwealth of
Massachusetts
My commission expires Feb. 10, 1956

A true copy, of petition and order of court thereon.

Attest,

(SEAL)

FREDERICK L. QUINLAN
Clerk

After hearing, petition dismissed on ground that exceptions do not appear meritorious.

Signed: STANLEY E. QUA,
Chief Justice.

Filed July 10, 1952
Attest: FREDERICK L. QUINLAN,
Clerk.

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...EL COPY

Office - Supreme Court
FILED
OCT 29 19
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 434

DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES, *Appellant*

v.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT, *Appellees*

APPELLANT'S MOTION TO SUPPLEMENT THE RECORD AND MEMORANDUM

DAVID RINES
RINES AND RINES
Attorneys for the Appellant,
No. Ten Post Office Square,
Boston 9, Massachusetts

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 434

DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES, *Appellant*

v.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT, *Appellees*

APPELLANT'S MOTION TO SUPPLEMENT THE RECORD

Now comes the appellant in the above-entitled suit, David Rines, Administrator of the Estate of Lucy L. Rines, and moves for an order permitting him to supplement the record of the above-entitled suit by adding thereto the following:

1. The annexed Exhibit A, a certified copy of the record in the Supreme Judicial Court of the Commonwealth of Massachusetts, No. 11,207, David Rines, Administrator of the Estate of Lucy L. Rines, "Plaintiff's Petition to Establish the Truth of Exceptions", in the suit in the Superior Court for the Commonwealth of Massachusetts, No. 42024,

David Rines, Administrator of the Estate of Lucy L. Rines v. Armin Klein.

2. The annexed Exhibit B, a certified copy of the record in the Supreme Judicial Court of the Commonwealth of Massachusetts, No. 11,208, David Rines, Administrator of the Estate of Lucy L. Rines, "Plaintiff's Petition to Establish the Truth of Exceptions", in the suit in the Superior Court for the Commonwealth of Massachusetts, No. 42028, David Rines, Administrator of the Estate of Lucy L. Rines v. Reuben B. Davidoff.

3. A petition for rehearing, and the action taken thereon, in the suit, No. 11,262, in the Supreme Judicial Court of the Commonwealth of Massachusetts, entitled, David Rines, Administrator of the Estate of Lucy L. Rines, Petitioner v. The Honorable Justices of the Superior Court, Respondents. This is the suit involved in this appeal.

It is further moved that this Court request the Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts to send to this Court, for inspection, the said petition for rehearing, and also a like petition for rehearing in the companion case, No. 11,261. The Chief Justice has stated to this appellant that he will honor such request.

The grounds for this motion are stated in the accompanying memorandum, from which it appears that this Court will need these additional documents, or, at least, may need them, to help this Court decide whether the appellant is correct in his contention, on this appeal, that he has been denied due process.

DAVID RINES
RINES AND RINES
Attorneys for the Appellant,
No. Ten Post Office Square,
Boston 9, Massachusetts

Supreme Court of the United States

OCTOBER TERM, 1953

No. 434

DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES, *Appellant*

v.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT, *Appellees*

APPELLANT'S MEMORANDUM IN SUPPORT OF HIS MOTION TO SUPPLEMENT THE RECORD

This is a motion by the appellant for an order permitting him to supplement the record in the above-entitled suit by adding thereto the following:

1. The annexed Exhibit A, a certified copy of the record in the Supreme Judicial Court of the Commonwealth of Massachusetts, No. 11,207, David Rines, Administrator of the Estate of Lucy L. Rines, "Plaintiff's Petition to Establish the Truth of Exceptions", in the suit in the Superior Court for the Commonwealth of Massachusetts, No. 42024, David Rines, Administrator of the Estate of Lucy L. Rines v. Armin Klein.

2. The annexed Exhibit B, a certified copy of the record in the Supreme Judicial Court of the Commonwealth of Massachusetts, No. 11,208, David Rines, Administrator of the Estate of Lucy L. Rines, "Plaintiff's Petition to Establish the Truth of Exceptions", in the suit in the Superior Court for the Commonwealth of Massachusetts, No. 42028, David Rines, Administrator of the Estate of Lucy L. Rines v. Reuben B. Davidoff.

3. A petition for rehearing, and the action taken thereon, in the suit, No. 11,262, in the Supreme Judicial Court of the Commonwealth of Massachusetts, entitled, David Rines,

Administrator of the Estate of Lucy L. Rines, Petitioner v. The Honorable Justices of the Superior Court, Respondents. This is the suit involved in this appeal.

The above-entitled suit and the companion suit, No. 433 are appeals from the final rescript or judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts made and entered on July 3, 1953.

The records of the said Exhibits A and B, under items 1 and 2, are the same as those that are referred to in the "STATEMENT AS TO JURISDICTION" in the above-entitled suit, under the heading: "Opinions Below".

The Petition for Rehearing, item 3, is discussed in the said "STATEMENT AS TO JURISDICTION" under the heading "The Nature of the Case, The Rulings Which Give Jurisdiction and The Manner In Which The Federal Questions Sought To Be Reviewed Were Raised", and it is there stated that, under the practice in the said Supreme Judicial Court, neither petitions for rehearing nor the action taken thereon are made of record.

Prior to the said rescript or judgment, the appellant had contended that, as applied, the state statute, chapter 231, section 127 of the General Laws of the Commonwealth of Massachusetts, is repugnant to the Fourteenth Amendment.

The said rescript or judgment, however, raised the issue of the repugnancy of two additional state statutes, chapter 231, sections 113 and 111 of the said General Laws. Prior to the said rescript or judgment, therefore, the appellant had not been afforded an opportunity to place himself of record as to that additional issue.

The appellant accordingly attempted to bring that additional issue before the Supreme Judicial Court by petitions for rehearing in the said two suits. These petitions for rehearing were denied, without opinion.

According to the practice in the Supreme Judicial Court, however, neither petitions for rehearing, nor the action taken thereon become part of the record. The appellant has no remedy, therefore, for placing these additional docu-

ments before this Court, other than through the remedy of this motion.

The Chief Justice of the Supreme Judicial Court of The Commonwealth of Massachusetts has stated to the appellant that, since the said petitions for rehearing and the action taken thereon are not matters of record in his court, it is his opinion that they therefore are not properly matters to be considered by this Court; but that, if this Court should disagree with this opinion, he will gladly submit the said petitions for rehearing and the action taken thereon in response to a simple request from this Court that that be done.

DAVID RINES
RINES AND RINES
Attorneys for the Appellant,
No. Ten Post Office Square,
Boston 9, Massachusetts

Service of copies of the annexed motion to supplement the record, Exhibits A and B referred to therein, and the Memorandum in Support of the said motion is acknowledged this 23rd day of October, 1953.

HARRIS A. REYNOLDS
Assistant Attorney General
Attorney for the Appellees

EXHIBIT A

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

Norfolk, ss

DAVID RINES, ADMINISTRATOR OF ESTATE OF LUCY L. RINES,
PETITIONER TO ESTABLISH THE TRUTH OF EXCEPTIONS

Plaintiff's Petition to Establish the Truth of Exceptions

To the Honorable the Justices of the Supreme Judicial Court for the Commonwealth:

Respectfully represents your petitioner that he is the plaintiff in a certain action of tort against Armin Klein, brought in and now pending in the Superior Court in and for the County of Norfolk and numbered 42024 on the docket thereof; that said action was tried, with fifteen other cases, before Mr. Justice Kirk and a jury on nineteen days ending February 19, 1948, resulting in verdicts for the plaintiff for $2000. on Count 1 and $6000. on Count 8, said verdicts being entered under leave reserved; that a motion was filed by the defendant for directed verdicts in his favor on both of said counts under the leave reserved, and also a motion for a new trial; that on February 27, 1948, Mr. Justice Kirk allowed the motion for directed verdict as to Count 1 and denied it as to Count 8, and granted the motion for new trial as to Count 8 on grounds 1, 2 and 4 as set forth in the motion; that the plaintiff duly excepted thereto but subsequently waived said Count 8; that on October 3, 1951, Mr. Justice Kirk entered an order for a new trial on said Count 1; that the plaintiff has filed a consolidated bill of exceptions covering many exceptions saved by him during the trial of this and the fifteen other cases, which bill of exceptions has not as yet been acted upon by Mr. Justice Kirk; that the plaintiff duly and seasonably excepted to the order of October 3, 1951 for a new trial on said Count 1 and duly and seasonably, to wit on October 23, 1951, filed his bill of exceptions to said order, and on said day delivered

to Charles J. Dunn, Esquire, attorney of record for the defendant, a written notice of the filing of said bill of exceptions and a copy of said bill; that on January 14, 1952 the plaintiff, by his attorney Lester W. Cooch, Esquire, duly presented said bill of exceptions to Mr. Justice Kirk, and on January 15, 1952 filed in the clerk's office of Norfolk Superior Court an affidavit of the said presentation; that all requirements of law with regard to saving and completing his exception to the said order of October 3, 1951 for a new trial have been complied with by the plaintiff; that, following a hearing on June 20, 1952, Mr. Justice Kirk on the same day took the following action on said bill of exceptions:

> "The within bill of exceptions, hearing having been had on the same on this date, is disallowed because it is not conformable to the truth as to a material matter, and otherwise is not a proper bill of exceptions."

that notice of said action was received by your petitioner on June 25, 1952; that this petition is filed in the full court within twenty days of the receipt of said notice; that a copy of the bill of exceptions is attached hereto marked "A" and is incorporated in and made a part of this petition; that the said bill of exceptions is in conformity with the truth and sets forth a true statement of the pertinent facts and attendant circumstances sufficient to enable the court to determine the question of law raised by said exception; that the plaintiff, your petitioner, is aggrieved by the said order of Mr. Justice Kirk dated June 20, 1952, hereinbefore set forth, disallowing the said bill of exceptions; that before the filing of this petition, your petitioner gave notice thereof to the adverse party by delivering a copy thereof to him or his attorney of record in accordance with Rule 22 of the Rules for the Regulation of Practice Before the Full Court, as appears by the affidavit and oath annexed hereto and marked "B"; that your petitioner has complied with all the requisitions prescribed by said Rule 22;

WHEREFORE your petitioner prays that he may be allowed to establish before this court the truth of the allegations in said bill of exceptions (a copy of which is annexed hereto and marked "A") and the truth of the exceptions presented therein, and thereupon, the truth of the exceptions being established, that they be heard, and the same proceedings taken, as if the exceptions had been duly allowed and entered.

By His Attorney
LESTER W. COOCH

AFFIDAVIT

I, Lester W. Cooch, on oath depose and say that the statements and allegations in the foregoing petition subscribed by me, are true, and that the said bill of exceptions marked "A" conforms to the truth.

LESTER W. COOCH

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss July 9, 1952

Then personally appeared Lester W. Cooch and made oath that the statements and allegations in the foregoing petition to establish the truth of exceptions and the affidavit appended thereto, both of which are subscribed by him, are true, before me

A. VAN ALLEN THOMASON
Notary Public in and for
the Commonwealth of
Massachusetts

My commission expires Oct. 8, 1954

"A"

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss; Superior Court
No. 42024

DAVID RINES, ADMR. OF ESTATE OF LUCY L. RINES

v.

ARMIN KLEIN

Plaintiff's Bill of Exceptions to Order for a New Trial

This action of tort is to recover damages arising from the illness and death of Lucy L. Rines, wife of the plaintiff, of whose estate he is the administrator. This bill of exceptions relates to the order of Mr. Justice Paul G. Kirk dated October 3, 1951 that a new trial be had on Count 1 in this case.

The pleadings on which the case was tried on the merits consisted of a declaration and an answer, each of which is incorporated by reference in this bill of exceptions and may be referred to.

The case was tried with fifteen other cases before Mr. Justice Kirk and a jury at Dedham on 19 days, beginning on January 26, 1948 and ending on February 19, 1948. Dr. Reynald Chase, of New York, was produced by the plaintiff at the trial on the merits. Early in his testimony the judge ruled that he was not qualified to testify. This ruling was later changed and he was permitted to testify. His testimony began on February 11, 1948 and continued, with some interruptions, on the 12th, 13th and 16th. The official transcript of his testimony covers about 230 pages. After all testimony had been taken, the defendants moved

> "that all of the testimony of Dr. Chase, in which he gave opinions that various defendant doctors were guilty of bad practice, be struck from the record, on the ground that it now appears that he is not qualified to express any opinion as to the practice in Boston of doctors specializing in the fields in which the various

doctors have specialized, and that any evidence given by Dr. Chase to the effect that any act of malpractice on the part of any defendant doctor caused proximal damage or death, be stricken from the record, on the ground that on his own testimony he is not competent to express such an opinion."

This motion was denied by Judge Kirk.

During the trial the plaintiff waived Count 3 and the Court directed verdicts for the defendant on Counts 2, 4, 5, 6, 7 and 9.

The Jury returned verdicts as follows:

Count 1, Plaintiff for $2000.00
Count 8, Plaintiff for $6000.00

which verdicts were entered under leave reserved.

Counsel for the defendant, Charles J. Dunn, Esquire, filed a motion for directed verdicts under the leave reserved on Counts 1 and 8, which motion is incorporated in this bill of exceptions by reference and may be referred to, and also a motion for a new trial reading as follows:

Defendant's Motion for a New Trial

Now comes the defendant in the above entitled action and moves the Court after verdict and before judgment to set aside said verdict and grant a new trial and respectfully assigns as reasons therefor the following:

1. The verdict rendered in said case was against the evidence.
2. The verdict rendered in said case was against the evidence and the weight of the evidence.
3. The verdict rendered in said case was against the evidence, the weight of the evidence presented and the law.
4. The damages awarded are excessive.

By his attorney,
(Sgd) Charles J. Dunn

The motion for directed verdict under leave reserved was on February 27, 1948 allowed as to Count 1 and denied as to Count 8, after which the Court entered a verdict for the defendant under the leave reserved as to Count 1.

The Court, on February 27, 1948, took action on the motion for new trial in the following words:

> "Granted as to Count 8, on grounds 1, 2 and 4 as set forth in Motion."

The plaintiff duly excepted thereto.

On May 8, 1950, the plaintiff waived Count 8.

On January 31, 1949, the plaintiff filed his Consolidated Bill of Exceptions of 1171 typewritten pages, covering this case and the 15 other cases with which it was tried. On January 30, 1950 he filed his Substitute Consolidated Bill of Exceptions of 714 typewritten pages, with his motion to substitute it for the bill filed on January 31, 1949. The court, by Mr. Justice Paul G. Kirk, after hearing, denied this motion on January 8, 1951, but granted the plaintiff leave to file on or before May 6, 1951 his Second Substitute Consolidated Bill of Exceptions. At the hearing on this motion Judge Kirk stated that he had taken no action on the motions for new trials and that he did not intend to do so. On May 4, 1951 the plaintiff filed his Second Substitute Consolidated Bill of Exceptions of 272 typewritten pages, with motions that he be permitted to substitute it for the original bill filed on January 31, 1949 and that this last bill be allowed. No hearing has been had and no action has been taken by the court on those motions, although the plaintiff has requested Judge Kirk, both orally and in writing, to set a time for hearing them.

On February 15, 1951 Charles J. Dunn, Esquire, attorney for the defendant, wrote the following letter to Honorable Paul G. Kirk, the judge in this case:

February 15, 1951

Honorable Paul G. Kirk
Superior Court, Suffolk County
Boston, Massachusetts

Re: Rines vs. Armin Klein
Rines vs. Reuben B. Davidoff

Dear Judge:

Sometime ago I received notice from the Massachusetts Medical Society that disciplinary action had been taken by the New York Medical Society against Dr. Reynald H. Chase because of testimony given in the above cases. You will recall that Dr. Chase testified among his qualifications that he did ten deep femoral bi-lateral ligations before 1942. The Committee of Ethics and Discipline of the New York Medical Society gave Dr. Chase an opportunity to substantiate the truth of this testimony together with other statements he had made before you at the trial. They were found to be wholly false, no basis in fact or truth and, although I have not been informed of the precise penalty, I know some disciplinary measures were adopted.

In view of the above, I should like to renew the motions for new trial which I filed and which you still have not acted upon, namely David Rines, Admr. vs. Reuben Davidoff on Counts I and V and David Rines, Admr. vs. Armin Klein on Count I.

I have notified all counsel by sending them a copy of this letter.

Very truly yours,

CHARLES J. DUNN

CJD:W

On February 26, 1951, the plaintiff's attorney, Lester W. Cooch, Esquire, was notified by direction of Judge Kirk that the latter wished to see him and Mr. Dunn

> "to discuss the matters of Mr. Dunn's recent letter . . . the purpose of which is to prepare the ground for a formal hearing of the matters".

Action on this matter was postponed owing to Mr. Cooch's absence.

On June 5, 1951, Judge Kirk requested Mr. Cooch to inform Mr. Dunn that he wished to see them for a preliminary hearing to discuss Mr. Dunn's letter for the purpose of making arrangements for a formal hearing, allowing time to have witnesses come from New York, if deemed necessary. On June 12, 1951, Mr. Dunn informed Mr. Cooch that Judge Kirk had set June 25, 1951 at 4:00 p.m. in the Judges' Lobby of Suffolk Court House for seeing them in this connection.

The Plaintiff, a member of the Massachusetts Bar in good standing, requested of Judge Kirk that he be allowed to be present at this hearing, to which the Judge replied by a letter to Mr. Cooch dated June 14, 1951, as follows:

> "I have your letter wherein you request that Mr. Rines be present at the conference set down by me amongst counsel, in the above cases. So far as these cases are concerned, Mr. Rines is not a member of the Bar, but is a party plaintiff. He will not be permitted to be present."

On June 20, 1951, Mr. Rines duly entered his appearance as attorney for the plaintiff in this case and in the 15 other cases with which it was tried.

On June 25, 1951, Mr. Cooch and Mr. Dunn presented themselves at the Judges' Lobby and were ushered into a small hearing room. At 3:57 p.m. Judge Kirk entered whereupon the following colloquy occurred, in substance:

> Mr. Cooch: Your Honor, Mr. Rines is coming up.
>
> Judge Kirk: I gave you your instructions on that. He is not coming in.
>
> Mr. Cooch: There has been a little change since then. Mr. Rines has entered his appearances in each case and is now a counsel of record.
>
> Judge Kirk: I don't care whether or not he has entered appearances or what he has done, he is not going to be present at this conference and I told you so.

The judge then asked Mr. Dunn to state "what he had to say regarding the undisposed motions for new trials."

Mr. Dunn, who had some papers in front of him, said in substance the following to the judge:

> "You will recall that I wrote you last February. I am sure that you probably expected me to come here with affidavits and things of that kind. I have not got them and I think I can tell you why. Sometime ago the Massachusetts Medical Society informed me that the New York Medical Society had taken disciplinary action against Dr. Chase because of perjury before you when these cases were tried. It seems, however, that they are or were not able to furnish affirmative proof, but they could find no record of any deep femoral ligations having been performed by Dr. Chase."

The Judge interrupted by saying "Before 1942 do you mean?" Mr. Dunn said:

> "Yes. I have received this information from a doctor who I think is Dr. Gallupe and I expect that it can be called negative. I sent my brother John to New York to check it up, but he was unable to find anything to show that these operations had been performed by Dr. Chase. Possibly this may be accounted for by the fact that I understand that Dr. Chase did not cooperate by giving the names of the patients so that the records could be examined."

At this point the Court messenger opened the door and said to Judge Kirk: "Mr. Rines is here". The judge then rose and pointing his finger at Mr. Cooch said: "You go out and tell Mr. Rines that he is not going to come in here. Also, I want you to understand that there is to be no coming and going about it, it is final. Tell him that." Mr. Cooch did as instructed, and while doing so the Judge came out of the room and walked down the hall. Mr. Rines then entered the room and sat down, followed by Mr. Cooch. In a few minutes the judge returned. Standing near the entrance door he looked at Mr. Rines and said: "How do you do

Mr. Rines. Are you going to be in here?" Mr. Rines replied: "Judge Kirk, I want to talk with you. I want to inquire why you are keeping me out." Judge Kirk then said: "Gentlemen, the hearing is cancelled" and walked out.

The following day, June 26, 1951, Mr. Cooch received a telephone message at his home in Abington at 1:10 p.m. that Judge Kirk wanted to see him in the Judges' Lobby in Boston at 2:00 p.m. Upon his arrival directly from his home, both he and Mr. Dunn were ushered into the same hearing room. Judge Kirk entered and the following colloquy immediately occurred, in substance:

Judge Kirk: "This is all that will be here today".

Mr. Cooch: "Did Mr. Eckert deliver to you my message that I had followed your instructions of yesterday explicitly?"

Judge Kirk: "That was the most contemptible thing I have ever seen, and most reprehensible on your part."

Mr. Cooch: "What do you mean by 'reprehensible' on my part?"

Judge Kirk: "That entry of appearances by Mr. Rines was just a subterfuge on your part to get around instructions which I had given you. It won't work with me."

Mr. Cooch: "I wrote you some time ago that Mr. Rines demanded to be present and I assume he has a perfect right to enter his appearances and be a counsel of record."

Judge Kirk: "I consider it a subterfuge. Most lawyers are able to control their clients."

Mr. Cooch: "Mr. Rines is not only a client, but a co-attorney."

Judge Kirk: "I have seen many lawyers of equal or greater stature than you withdraw their appearances if their advice is not taken." (Pause) "I don't say that you ought to withdraw your appearances, but I still consider this a subterfuge."

Judge Kirk: "I think Mr. Dunn should have an opportunity to proceed with what he was saying before he was so rudely interrupted yesterday. For the pur-

pose of refreshing my recollection I want to be sure I understand the strategy of Mr. Schloss (the plaintiff's trial attorney) in presenting his case. Did he put the doctors on first and Dr. Chase last?"

Mr. Cooch: "I have no records with me, but I think he interspersed lay witnesses between the doctors, and that Dr. Chase was the last plaintiff's witness, unless possibly Mr. Rines came after him."

Mr. Dunn then proceeded, saying that "Dr. Chase was a liar, a perjurer, a bum and one who for plenty of money came to Boston to give false testimony. You know that this is so Judge, because in your charge you called him a charlatan". The judge made no reply of any kind to that remark.

Mr. Dunn then continued in substance that he had sent his brother John to New York, but that he had been unable, while there, to obtain any information from the hospitals showing that Dr. Chase had performed the operations about which he testified; that if Dr. Chase were on the level, he would not have withheld such vital information; that the information that he, Mr. Dunn, had came from the Massachusetts Medical Society; that he did not know whether or not Dr. Chase had been disciplined in New York, but he felt very sure that he had been; that that Society in New York was not able to corroborate the doctor's testimony in Dedham and that it had decided that the testimony was wholly false; that he, Mr. Dunn, had no information about any disciplinary action, but that he was sure something had been done along that line.

Mr. Dunn did not show to the Judge or to Mr. Cooch any letters, affidavits, or papers of any kind. He also stated that he did not consider or intend to treat the matters which he had covered in his remarks as newly-discovered evidence; that he did not intend to file any motions based on newly-discovered evidence; and that he agreed that whatever consideration is given or action taken on his request for new trial is to be limited to the motions already filed and the grounds which were listed in them.

No motion for new trial has been filed in this case, except the one previously referred to, and no affidavits of newly-discovered evidence have been filed.

The next day, June 27, 1951, Mr. Cooch wrote Judge Kirk a letter, excerpts from which, and which correctly state the facts, follow:

> "My reasons for contending that you do not at this time allow in whole or in part Mr. Dunn's motions for new trials in the Klein and Davidoff cases are:
>
> 1. It would be inconsistent with the action you have taken on the motions for directed verdicts under the leave reserved.
>
> 2. All verdicts already are for the defendants. What more would they gain by new trials? It would mean great expenditures of time and money, and the defendants might even get verdicts against them.
>
> 3. Mr. Dunn stated before you yesterday that he is not urging any newly-discovered evidence, and that he is not going to file any new motions based on that ground. Such motions, if filed, should be accompanied by affidavits, copies of which should be furnished the plaintiff so that he may have some knowledge of what is contended and have an opportunity to prepare his defense thereto at a hearing on the motions.
>
> 4. The matter therefore is limited to the motions already filed and the grounds set forth therein.
>
> 5. What is now urged by Mr. Dunn was brought out at length at the trial, including the vituperations made by him before you yesterday. The evidence which the jury had before it, and on which it properly could act, included all that Mr. Dunn now asserts, and more. The verdicts were not against that evidence, or the weight of it, or the law.
>
> 6. Despite Mr. Dunn's statement to the contrary, what he is really insisting upon now is newly-discovered matter. This is not open to him as the record now stands.

7. Assuming, but not admitting, that it is shown to you that Dr. Chase committed perjury at the trial, I contend that that point was stressed at the trial and considered by the jury.

8. Finally, what have you before you now as a result of the hearing, or conference, that you did not know before? Mr. Dunn offered nothing either factual or affirmative. He read from, or paraphrased, extracts of letters which he or someone else received, and said that his brother could find no records in New York sustaining Dr. Chase, partly, if not wholly, because Dr. Chase did not furnish the names of his patients. There was nothing offered you except negative hearsay by persons obviously greatly prejudiced. Mr. Dunn did not even show the letters to you or even read their entire contents. Mr. Dunn's letter to you February 15, 1951 said in effect merely that the Massachusetts Medical Society notified him that disciplinary action (the nature of which Mr. Dunn admits he does not know) has been taken by the New York Medical Society against Dr. Chase because of the testimony given by the doctor in the trial of our cases. Apparently that Society "gave Dr. Chase an opportunity to substantiate the truth of this testimony together with other statements he made before you at the trial". From what I can glean from Mr. Dunn's remarks, Dr. Chase did not discuss that testimony with the New York Society or give it the names of his patients. So that Society found Dr. Chase's testimony "to be wholly false, no basis in fact or truth", with some suggestions of a penalty of which Mr. Dunn disclaims knowledge! This is pretty thin material on which to base such a serious charge or to urge you to take such drastic measures at this stage, even admitting for this purpose only, that such action can now be taken on the record and material which you have before you."

Nothing further happened until Judge Kirk on October 3, 1951 entered an order for a new trial on Count 1 in this case. The said order is as follows:

ORDER OF COURT ON MOTION FOR NEW TRIAL

1. This is one of 16 cases, embracing 107 counts (subsequently reduced to 79 counts) brought by the plaintiff individually or in his capacity as administrator of his wife's estate, against the Beth Israel Hospital and numerous physicians, surgeons and nurses who attended his wife or acted as consultants during her illness.

2. The trial lasted 17 trial days.

3. The last witness for the plaintiff, and the last principal witness in the case was one Dr. Reynald H. Chase of New York who was presented to give expert opinion testimony. I initially ruled that Dr. Chase was not qualified, but on the same day, following the noon recess changed my ruling and permitted him to testify. I had grave doubts as to Dr. Chase's qualifications. In permitting Dr. Chase to testify, I was influenced, among other considerations, by the following:—the known difficulty which plaintiffs have in procuring expert witnesses in malpractice cases; the prospect that a wiser determination of his qualifications could be made after he had testified at length; the many days already expended in the trial of the cases; and the prospect that the verdicts of the jury would finally dispose of most, if not all, of the litigation.

4. I am entirely satisfied that Dr. Chase did not have the surgical experience which he testified he did have; that he was not qualified to give expert opinion testimony in these cases; that my ruling permitting him to testify was a mistake; that this mistake was the substantial if not the sole factor in producing verdicts for the plaintiff in four of the eighteen counts which were submitted to the jury; that these verdicts represent a miscarriage of justice.

5. It is therefore ordered that a new trial be had on Count 1 in the above case on the ground that the verdict is against the weight of the evidence.

PAUL G. KIRK
Justice of the Superior Court

October 3, 1951

The plaintiff duly excepted to this order for new trial on Count 1 and filed with the clerk, within the required three days after the receipt from the clerk of notice thereof, his exceptions in writing, as follows:

PLAINTIFF'S CLAIM OF EXCEPTIONS TO THE ORDER OF THE COURT ON MOTION FOR NEW TRIAL

Now comes the plaintiff having on October 5, 1951 received notice from the clerk of the order of Mr. Justice Paul G. Kirk dated October 3, 1951 that a new trial be had on count 1 in the above case on the ground that the verdict is against the weight of the evidence, and, being aggrieved thereby, claims an exception therefrom to the Supreme Judicial Court.

By his attorney,
LESTER W. COOCH

This bill of exceptions contains all the evidence and facts material to the exceptions alleged.

The plaintiff, being aggrieved by the action of the Court in ordering a new trial on Count 1 in this case, exceptions to which were duly taken by him as hereinbefore set forth, files this, his bill of exceptions and prays that the same may be allowed.

DAVID RINES
Administrator of the
Estate of Lucy L. Rines

By LESTER W. COOCH
His Attorney

"B"

Affidavit

I, Lester W. Cooch, attorney of record for the petitioner, on oath depose and say that on July 10, 1952, before the filing of this petition, I delivered in hand to Charles J. Dunn, Esquire, attorney of record for the adverse party, Armin Klein, a full and complete copy of this petition to establish the truth of exceptions, including all affidavits, oaths and signatures which were a part thereof, and at the same time I delivered in hand to him a letter of which the following is a true copy:

July 10, 1952

Charles J. Dunn, Esq.
908 Barristers Hall
Boston, Massachusetts

re: Rines, admr. vs. Klein

Dear Mr. Dunn:

This is to notify you that, after delivering this notice and copy of petition to you, I shall file in the clerk's office of the full court of the Supreme Judicial Court for the Commonwealth, the original of the petition of David Rines, administrator of the estate of Lucy L. Rines, to establish the truth of his exceptions to the order of Judge Kirk dated October 3, 1951 for a new trial as to Count 1, the copy of which petition I am now delivering to you being an exact copy thereof.

LESTER W. COOCH

Attorney for David Rines Admr. of estate of Lucy L. Rines, petitioner.

LESTER W. COOCH

BLEED THROUGH POOR COPY

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. July 10, 1952

Then personally appeared Lester W. Cooch, and made oath that the statements contained in the foregoing affidavit subscribed by him, are true, before me.

HARRISON D. MASON
Notary Public in and for
the Commonwealth of
Massachusetts
My commission expires Feb. 10, 1956

A true copy, of petition and order of court thereon.

Attest,

FREDERICK L. QUINLAN
Clerk

(SEAL)

After hearing, petition dismissed on ground that exceptions do not appear meritorious.

Signed: STANLEY E. QUA,
Chief Justice.

Filed July 10, 1952
Attest: FREDERICK L. QUINLAN,
Clerk.

EXHIBIT B

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

Norfolk, ss

DAVID RINES, ADMINISTRATOR OF ESTATE OF LUCY L. RINES,
PETITIONER TO ESTABLISH THE TRUTH OF EXCEPTIONS

Plaintiff's Petition to Establish the Truth of Exceptions

To the Honorable the Justices of the Supreme Judicial Court for the Commonwealth:

Respectfully represents your petitioner that he is the plaintiff in a certain action of tort against Reuben B. Davidoff, brought in and now pending in the Superior Court in and for the County of Norfolk and numbered 42028 in the docket thereof; that said action was tried, with fifteen other cases, before Mr. Justice Kirk and a jury on nineteen days ending February 19, 1948, resulting in verdicts for the plaintiff for $2000. on Count 1 and $5000. on Count 5, and for the defendant on Count 8, which said plaintiff's verdicts were entered under leave reserved; that a motion was filed by the defendant for directed verdicts in his favor on both of said counts 1 and 5 under the leave reserved, and also a motion for a new trial; that on February 27, 1948 Mr. Justice Kirk allowed the motion for directed verdicts as to Counts 1 and 5, and took no action on the motion for new trial; that the plaintiff duly excepted thereto; that on October 3, 1951, Mr. Justice Kirk entered an order for a new trial on said Counts 1 and 5; that the plaintiff has filed a consolidated bill of exceptions covering many exceptions saved by him during the trial of this and fifteen other cases, which bill of exceptions has not as yet been acted upon by Mr. Justice Kirk; that the plaintiff duly and seasonably excepted to the order of October 3, 1951 for a new trial on said Counts 1 and 5 and duly and seasonably, to wit on October 23, 1951, filed his bill of exceptions to said order, and on

said day delivered to Charles J. Dunn, Esquire, attorney of record for the defendant, a written notice of the filing of said bill of exceptions and a copy of said bill; that on January 14, 1952 the plaintiff, by his attorney Lester W. Cooch, Esquire, duly presented said bill of exceptions to Mr. Justice Kirk, and on January 15, 1952 filed in the clerk's office of Norfolk Superior Court an affidavit of the said presentation; that all requirements of law with regard to saving and completing his exception to the said order of October 3, 1951 for a new trial have been complied with by the plaintiff; that, following a hearing on June 20, 1952, Mr. Justice Kirk on the same day took the following action on said bill of exceptions:

> "The within bill of exceptions, hearing having been had on the same on this date, is disallowed because it is not conformable to the truth as to a material matter, and otherwise is not a proper bill of exceptions."

that notice of said action was received by your petitioner on June 25, 1952; that this petition is filed in the full court within twenty days of the receipt of said notice; that a copy of the bill of exceptions is attached hereto marked "A" and is incorporated in and made a part of this petition; that the said bill of exceptions is in conformity with the truth and sets forth a true statement of the pertinent facts and attendant circumstances sufficient to enable the court to determine the question of law raised by said exception; that the plaintiff, your petitioner, is aggrieved by the said order of Mr. Justice Kirk dated June 20, 1952, hereinbefore set forth, disallowing the said bill of exceptions; that before the filing of this petition, your petitioner gave notice thereof to the adverse party by delivering a copy thereof to him or his attorney of record in accordance with Rule 22 of the Rules for the Regulation of Practice Before the Full Court, as appears by the affidavit and oath annexed hereto and marked "B"; that your petitioner has complied with all the requisitions prescribed by said Rule 22;

WHEREFORE your petitioner prays that he may be allowed to establish before this court the truth of the allegations in said bill of exceptions (a copy of which is annexed hereto and marked "A") and the truth of the exceptions presented therein, and thereupon, the truth of the exceptions being established, that they be heard, and the same proceedings taken, as if the exceptions had been duly allowed and entered.

By His Attorney
LESTER W. COOCH

AFFIDAVIT

I, Lester W. Cooch, on oath depose and say that the statements and allegations in the foregoing petition subscribed by me, are true, and that the said bill of exceptions marked "A" conforms to the truth.

LESTER W. COOCH

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss July 9, 1952

Then personally appeared Lester W. Cooch and made oath that the statements and allegations in the foregoing petition to establish the truth of exceptions and the affidavit appended thereto, both of which are subscribed by him, are true, before me

A. VAN ALLEN THOMASON
Notary Public in and for
the Commonwealth of
Massachusetts

My commission expires Oct. 8, 1954

BLEED THROUGH POOR COPY

"A"

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss. Superior Court
No. 42028

DAVID RINES, ADMR. OF ESTATE OF LUCY L. RINES

v.

REUBEN B. DAVIDOFF

Plaintiff's Bill of Exceptions to Order for New Trial

This action of tort is to recover damages arising from the illness and death of Lucy L. Rines, wife of the plaintiff, of whose estate he is the administrator. This bill of exceptions relates to the order of Mr. Justice Paul G. Kirk dated October 3, 1951, that a new trial be had on Counts 1 and 5 in this case.

The pleadings on which the case was tried on the merits consisted of a declaration and an answer, each of which is incorporated by reference in this bill of exceptions and may be referred to.

The case was tried with 15 other cases before Mr. Justice Kirk and a jury at Dedham on 19 days, beginning on January 26, 1948 and ending on February 19, 1948. Dr. Reynald H. Chase, of New York, was produced by the plaintiff at the trial on the merits. Early in his testimony the judge ruled that he was not qualified to testify. This ruling was later changed and he was permitted to testify. His testimony began February 11, 1948 and continued, with some interruptions, on the 12th, 13th and 16th. The official transcript of his testimony covers about 230 pages. After all testimony had been taken, the defendants moved

> "that all of the testimony of Dr. Chase, in which he gave opinions that various defendant doctors were guilty of bad practice, be struck from the record, on the ground that it now appears that he is not qualified to express any opinion as to the practice in Boston of doctors specializing in the fields in which the various

doctors have specialized, and that any evidence given by Dr. Chase to the effect that any act of malpractice on the part of any defendant doctor caused proximal damage or death, be stricken from the record, on the ground that on his own testimony he is not competent to express such an opinion."

This motion was denied by Judge Kirk.

During the trial the plaintiff waived Count 3 and the Court directed verdicts for the defendant on Counts 2, 4, 6 and 7.

The jury returned verdicts as follows:

Count 1, Plaintiff for $2000.00
Count 5, Plaintiff for $5000.00
Count 8, for the defendant.

which plaintiff's verdicts were entered under leave reserved.

Counsel for the defendant, Charles J. Dunn, Esquire, filed a motion for directed verdicts under the leave reserved on Counts 1 and 5, which motion is incorporated in this bill of exceptions by reference and may be referred to, and also a motion for a new trial reading as follows:

Defendant's Motion for a New Trial

Now comes the defendant in the above entitled action and moves the Court after verdict and before judgment to set aside said verdict and grant a new trial and respectfully assigns as reasons therefor the following:

1. The verdict rendered in said case was against the evidence.
2. The verdict rendered in said case was against the evidence and the weight of the evidence.
3. The verdict rendered in said case was against the evidence, the weight of the evidence presented and the law.
4. The damages awarded are excessive.

By his attorney,
(Sgd) Charles J. Dunn

The motion for directed verdict under leave reserved was on February 27, 1948 allowed as to Counts 1 and 5, after which the court entered a verdict for the defendant under the leave reserved as to said Counts 1 and 5.

The court took no action on the motion for new trial.

On January 31, 1949 the plaintiff filed his Consolidated Bill of Exceptions of 1171 typewritten pages, covering this case and the 15 other cases with which it was tried. On January 30, 1950 he filed his Substitute Consolidated Bill of Exceptions of 714 typewritten pages, with his motion to substitute it for the bill filed on January 31, 1949. The Court, by Mr. Justice Paul G. Kirk, after hearing, denied this motion on January 8, 1951, but granted the plaintiff leave to file on or before May 6, 1951 his Second Substitute Consolidated Bill of Exceptions. At the hearing on this motion Judge Kirk stated that he had taken no action on the motions for new trials and that he did not intend to do so. On May 4, 1951 the plaintiff filed his Second Substitute Consolidated Bill of Exceptions of 272 typewritten pages, with motions that he be permitted to substitute it for the original bill filed on January 31, 1949, and that this last bill be allowed. No hearing has been had and no action has been taken by the court on those motions, although the plaintiff has requested Judge Kirk, both orally and in writing, to set a time for hearing them.

On February 15, 1951 Charles J. Dunn, Esquire, attorney for the defendant, wrote the following letter to Honorable Paul G. Kirk, the judge in this case:

February 15, 1951

Honorable Paul G. Kirk
Superior Court, Suffolk County
Boston, Massachusetts

Re: Rines vs. Armin Klein
Rines vs. Reuben B. Davidoff

Dear Judge:

Sometime ago I received notice from the Massachusetts Medical Society that disciplinary action had been

taken by the New York Medical Society against Dr. Reynald H. Chase because of testimony given in the above cases. You will recall that Dr. Chase testified among his qualifications that he did ten deep femoral bi-lateral ligations before 1942. The Committee of Ethics and Discipline of the New York Medical Society gave Dr. Chase an opportunity to substantiate the truth of this testimony together with other statements he had made before you at the trial. They were found to be wholly false, no basis in fact or truth and, although I have not been informed of the precise penalty, I know some disciplinary measures were adopted.

In view of the above, I should like to renew the motions for new trial which I filed and which you still have not acted upon, namely David Rines, Admr. vs. Reuben Davidoff on Counts I and V and David Rines, Admr. vs. Armin Klein on Count I.

I have notified all counsel by sending them a copy of this letter.

Very truly yours,

CHARLES J. DUNN

CJD:W

On February 26, 1951, the plaintiff's attorney, Lester W. Cooch, Esquire, was notified by direction of Judge Kirk that the latter wished to see him and Mr. Dunn "to discuss the matters of Mr. Dunn's recent letter—the purpose of which is to prepare the ground for a formal hearing of the matter". Action on this matter was postponed owing to Mr. Cooch's absence.

On June 5, 1951, Judge Kirk requested Mr. Cooch to inform Mr. Dunn that he wished to see them for a preliminary hearing to discuss Mr. Dunn's letter for the purpose of making arrangements for a formal hearing, allowing time to have witnesses come from New York, if deemed necessary. On June 12, 1951, Mr. Dunn informed Mr. Cooch that Judge Kirk had set June 25, 1951 at 4:00 p.m. in the Judges' Lobby of Suffolk Court House for seeing them in this connection.

The plaintiff, a member of the Massachusetts Bar in good standing, requested of Judge Kirk that he be allowed to be present at this hearing, to which the judge replied by a letter to Mr. Cooch dated June 14, 1951 as follows:

> "I have your letter wherein you request that Mr. Rines be present at the conference set down by me amongst counsel, in the above cases. So far as these cases are concerned, Mr. Rines is not a member of the Bar, but is a party plaintiff. He will not be permitted to be present."

On June 20, 1951, Mr. Rines duly entered his appearances as attorney for the plaintiff in this case and in the 15 other cases with which it was tried.

On June 25, 1951, Mr. Cooch and Mr. Dunn presented themselves at the Judges' Lobby and were ushered into a small hearing room. At 3:57 p.m. Judge Kirk entered whereupon the following colloquy occurred, in substance:

> Mr. Cooch: Your Honor, Mr. Rines is coming up.
>
> Judge Kirk: I gave you your instructions on that. He is not coming in.
>
> Mr. Cooch: There has been a little change since then. Mr. Rines has entered his appearances in each case and is now a counsel of record.
>
> Judge Kirk: I don't care whether or not he has entered appearances or what he has done, he is not going to be present at this conference and I told you so.

The Judge then asked Mr. Dunn to state "what he had to say regarding the undisposed motions for new trials."

Mr. Dunn, who had some papers in front of him, said in substance the following to the Judge:

> "You will recall that I wrote you last February. I am sure that you probably expected me to come here with affidavits and things of that kind. I have not got them and I think I can tell you why. Sometime ago the Massachusetts Medical Society informed me that the New York Medical Society had taken disciplinary

> action against Dr. Chase because of perjury before you when these cases were tried.
>
> It seems, however, that they are or were not able to furnish affirmative proof, but they could find no record of any deep femoral ligations having been performed by Dr. Chase."

The Judge interrupted by saying "Before 1942 do you mean?" Mr. Dunn said

> "Yes. I have received this information from a doctor who I think is Dr. Gallupe and I expect that it can be called negative. I sent my brother John to New York to check it up, but he was unable to find anything to show that these operations had been performed by Dr. Chase. Possibly this may be accounted for by the fact that I understand Dr. Chase did not cooperate by giving the names of the patients so that the records could be examined."

At this point the Court messenger opened the door and said to Judge Kirk: "Mr. Rines is here". The judge then rose and pointing his finger at Mr. Cooch said: "You go out and tell Mr. Rines that he is not going to come in here. Also, I want you to understand there is to be no coming and going about it, it is final. Tell him that". Mr. Cooch did as instructed, and while doing so the judge came out of the room and walked down the hall. Mr. Rines then entered the room and sat down, followed by Mr. Cooch. In a few minutes the judge returned. Standing near the entrance door he looked at Mr. Rines and said: "How do you do, Mr. Rines. Are you going to be in here?" Mr. Rines replied: "Judge Kirk, I want to talk with you. I want to inquire why you are keeping me out." Judge Kirk then said: "Gentlemen, the hearing is cancelled" and walked out.

The following day, June 26, 1951, Mr. Cooch received a telephone message at his home in Abington at 1:10 p.m. that Judge Kirk wanted to see him in the Judges' Lobby in

Boston at 2:00 p.m. Upon his arrival directly from his home, both he and Mr. Dunn were ushered into the same hearing room. Judge Kirk entered and the following colloquy immediately occurred, in substance:

Judge Kirk: This is all that will be here today.

Mr. Cooch: Did Mr. Eckert deliver to you my message that I had followed your instructions of yesterday explicitly?

Judge Kirk: That was the most contemptible thing I have ever seen, and most reprehensible on your part.

Mr. Cooch: What do you mean by 'reprehensible' on my part?

Judge Kirk: That entry of appearances by Mr. Rines was just a subterfuge on your part to get around instructions which I had given you. It won't work with me.

Mr. Cooch: I wrote you some time ago that Mr. Rines demanded to be present and I assume he has a perfect right to enter his appearances and be a counsel of record.

Judge Kirk: I consider it a subterfuge. Most lawyers are able to control their clients.

Mr. Cooch: Mr. Rines is not only a client, but a co-attorney.

Judge Kirk: I have seen many lawyers of equal or greater stature than you withdraw their appearances if their advice is not taken. (pause) I don't say that you ought to withdraw your appearances, but I still consider this a subterfuge.

Judge Kirk: I think Mr. Dunn should have an opportunity to proceed with what he was saying before he was so rudely interrupted yesterday. For the purpose of refreshing my recollection I want to be sure I understand the strategy of Mr. Schloss (the plaintiff's trial attorney) in presenting his case. Did he put the doctors on first and Dr. Chase last?

Mr. Cooch: I have no records with me, but I think he interspersed lay witnesses between the doctors, and that Dr. Chase was the last plaintiff's witness, unless possibly Mr. Rines came after him.

Mr. Dunn then proceeded, saying that "Dr. Chase was a liar, a perjurer, a bum and one who for plenty of money came to Boston to give false testimony. You know that this is so Judge, because in your charge you called him a charlatan." The judge made no reply of any kind to that remark.

Mr. Dunn then continued in substance that he had sent his brother John to New York, but that he had been unable, while there, to obtain any information from the hospitals showing that Dr. Chase had performed the operations about which he testified; that if Dr. Chase were on the level, he would not have withheld such vital information; that the information that he, Mr. Dunn, had came from the Massachusetts Medical Society; that he did not know whether or not Dr. Chase had been disciplined in New York, but he felt very sure that he had been; that that Society in New York was not able to corroborate the doctor's testimony in Dedham and that it had decided that the testimony was wholly false; that he, Mr. Dunn, had no information about any disciplinary action, but he was sure something had had been done along that line.

Mr. Dunn did not show to the Judge or to Mr. Cooch any letters, affidavits, or papers of any kind. He also stated that he did not consider or intend to treat the matters which he had covered in his remarks as newly-discovered evidence; that he did not intend to file any motions based on newly-discovered evidence; and that he agreed that whatever consideration is given or action taken on his request for new trial is to be limited to the motions already filed and the grounds which were listed in them.

No motion for new trial has been filed in this case, except the one previously referred to, and no affidavits of newly-discovered evidence have been filed.

The next day June 27, 1951, Mr. Cooch wrote Judge Kirk a letter, excerpts from which, and which correctly state the facts, follow:

"My reasons for contending that you do not at this time allow in whole or in part Mr. Dunn's motions for new trials in the Klein and Davidoff cases are:

1. It would be inconsistent with the action you have taken on the motions for directed verdicts under the leave reserved.

2. All verdicts already are for the defendants. What more would they gain by new trials? It would mean great expenditures of time and money, and the defendants might even get verdicts against them.

3. Mr. Dunn stated before you yesterday that he is not urging any newly-discovered evidence, and that he is not going to file any new motions based on that ground. Such motions, if filed, should be accompanied by affidavits, copies of which should be furnished the plaintiff so that he may have some knowledge of what is contended and have an opportunity to prepare his defense thereto at a hearing on the motions.

4. The matter therefore is limited to the motions already filed and the grounds set forth therein.

5. What is now urged by Mr. Dunn was brought out at length at the trial, including the vituperations made by him before you yesterday. The evidence which the jury had before it, and on which it properly could act, included all that Mr. Dunn now asserts, and more. The verdicts were not against that evidence, or the weight of it, or the law.

6. Despite Mr. Dunn's statement to the contrary, what he is really insisting upon now is newly-discovered matter. This is not open to him as the record now stands.

7. Assuming, but not admitting, that it is shown to you that Dr. Chase committed perjury at the trial, I contend that that point was stressed at the trial and considered by the jury.

8. Finally, what have you before you now as a result of the hearing, or conference, that you did not know before? Mr. Dunn offered nothing either factual or affirmative. He read from, or paraphrased, extracts

of letters which he or some one else received, and said that his brother could find no records in New York sustaining Dr. Chase, partly, if not wholly, because Dr. Chase did not furnish the names of his patients. There was nothing offered you except negative hearsay by persons obviously greatly prejudiced. Mr. Dunn did not even show the letters to you, or even read their entire contents. Mr. Dunn's letter to you February 15, 1951 said in effect merely that the Massachusetts Medical Society notified him that disciplinary action (the nature of which Mr. Dunn admits he does not know) has been taken by the New York Medical Society against Dr. Chase because of the testimony given by the doctor in the trial of our cases. Apparently that Society "gave Dr. Chase an opportunity to substantiate the truth of this testimony together with other statements he made before you at the trial." From what I can glean from Mr. Dunn's remarks, Dr. Chase did not discuss that testimony with the New York Society or give it the names of his patients. So that Society found Dr. Chase's testimony, "to be wholly false, no basis in fact or truth", with some suggestions of a penalty, of which Mr. Dunn disclaims knowledge! This is pretty thin material on which to base such a serious charge or to urge you to take such drastic measures at this stage, even admitting for this purpose only, that such action can now be taken on the record and material which you have before you."

Nothing further happened until Judge Kirk on October 3, 1951 entered an order for a new trial on Counts 1 and 5 in this case. The said order is as follows:

ORDER OF COURT ON MOTION FOR NEW TRIAL

1. This is one of 16 cases, embracing 107 counts (subsequently reduced to 79 counts) brought by the plaintiff individually or in his capacity as administrator of his wife's estate, against the Beth Israel Hospital and numerous physicians, surgeons and nurses who attended his wife or acted as consultants during her illness.

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2. The trial lasted 17 trial days.

3. The last witness for the plaintiff, and the last principal witness in the case, was one Dr. Reynald H. Chase of New York who was presented to give expert opinion testimony. I initially ruled that Dr. Chase was not qualified, but on the same day, following the noon recess, changed my ruling and permitted him to testify. I had grave doubts as to Dr. Chase's qualifications. In permitting Dr. Chase to testify, I was influenced, among other considerations, by the following:—the known difficulty which plaintiffs have in procuring expert witnesses in malpractice cases; the prospect that a wiser determination of his qualifications could be made after he had testified at length; the many days already expended in the trial of the cases; and the prospect that the verdicts of the jury would finally dispose of most, if not all, of the litigation.

4. I am entirely satisfied that Dr. Chase did not have the surgical experience which he testified he did have; that he was not qualified to give expert opinion testimony in these cases; that my ruling permitting him to testify was a mistake; that this mistake was the substantial if not the sole factor in producing verdicts for the plaintiff in four of the eighteen counts which were submitted to the jury; and that these verdicts represent a miscarriage of justice.

5. It is therefore ordered that a new trial be had on Counts 1 and 5 in the above case on the ground that verdicts thus returned are against the weight of the evidence.

(Sgd) Paul G. Kirk
Justice of the Superior Court.

October 3, 1951

The plaintiff duly excepted to this order for new trial on Counts 1 and 5 and filed with the clerk, within the required three days after the receipt from the clerk of notice thereof, his exceptions in writing, as follows:

PLAINTIFF'S CLAIM OF EXCEPTIONS TO THE ORDER OF THE COURT ON MOTION FOR NEW TRIAL

Now comes the plaintiff, having on October 5, 1951 received notice from the clerk of the order of Mr. Justice Paul G. Kirk dated October 3, 1951 that a new trial be had on Counts 1 and 5 in the above case on the ground that the verdict is against the weight of the evidence, and, being aggrieved thereby, claims an exception therefrom to the Supreme Judicial Court.

By his attorney
LESTER W. COOCH

This bill of exceptions contains all the evidence and facts material to the exceptions alleged.

The plaintiff, being aggrieved by the action of the Court in ordering a new trial on Counts 1 and 5 in this case, exceptions to which were duly taken by him as hereinbefore set forth, files this, his bill of exceptions and prays that the same may be allowed.

DAVID RINES,
Administrator of the Estate of Lucy L. Rines

By LESTER W. COOCH
His Attorney

"B"

Affidavit

I, Lester W. Cooch, attorney of record for the petitioner, on oath depose and say that on July 10, 1952, before the filing of this petition, I delivered in hand to Charles J. Dunn, Esquire, attorney of record for the adverse party, Reuben B. Davidoff, a full and complete copy of this petition to establish the truth of exceptions, including all affidavits, oaths and signatures which were a part thereof, and at the same time I delivered in hand to him a letter of which the following is a true copy:

BLEED THROUGH POOR COPY

Charles J. Dunn, Esq.
908 Barristers Hall
Boston, Massachusetts

July 10, 1952

Re: Rines, admr. vs. Davidoff

Dear Mr. Dunn:

This is to notify you that, after delivering this notice and copy of petition to you, I shall file in the clerk's office of the full court of the Supreme Judicial Court for the Commonwealth, the original of the petition of David Rines, administrator of the estate of Lucy L. Rines, to establish the truth of his exceptions to the order of Judge Kirk dated October 3, 1951 for a new trial as to Counts 1 and 5, a copy of which petition I am now delivering to you being an exact copy thereof.

LESTER W. COOCH
Attorney for David Rines, Admr. of estate of Lucy L. Rines, petitioner.

LESTER W. COOCH

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. July 10, 1952

Then personally appeared Lester W. Cooch, and made oath that the statements contained in the foregoing affidavit subscribed by him, are true, before me

HARRISON D. MASON
Notary Public in and for
the Commonwealth of
Massachusetts
My commission expires Feb. 10, 1956

A true copy, of petition and order of court thereon.

Attest,

(SEAL)

FREDERICK L. QUINLAN
Clerk

After hearing, petition dismissed on ground that exceptions do not appear meritorious.

Signed: STANLEY E. QUA,
Chief Justice.

Filed July 10, 1952
Attest: FREDERICK L. QUINLAN,
Clerk.

E COPY

FILED
JAN 15 1954
HAROLD B. WILLEY, Cle

Supreme Court of the United States

OCTOBER TERM, 1953

Nos. 433-434

DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES,

Appellant,

v.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT

APPEALS FROM THE SUPREME COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR REHEARING OR RECONSIDERATION

DAVID RINES,
RINES AND RINES,
Attorneys for the Appellant,
No. Ten Post Office Square,
Boston 9, Massachusetts.

Supreme Court of the United States

OCTOBER TERM, 1953

Nos. 433-434

DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES,

Appellant,

v.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT

APPEALS FROM THE SUPREME COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR REHEARING OR RECONSIDERATION

The appellant respectfully requests rehearing or reconsideration of this Court's dismissal of his appeals in the two suits, Nos. 433 and 434.

Those dismissals constitute a holding by this Court, for the first time in its long history, that a citizen of these United States may be deprived, by legislation of one of the States, of his right to trial by jury.

Chapter 231, section 127, General Laws of the Commonwealth of Massachusetts, Tercentenary Edition, empowers a judge of the Superior Court to set aside a jury's verdict and order a new trial, "at any time before judgment,"

even long after that judge has completely lost jurisdiction over the suit.

Three and one-half years after the final termination of the appellant's suits in the Superior Court (p. 4 of the Statement as to Jurisdiction), accordingly, a judge ordered new trials in those suits. He could not, of course, order the new trials without a hearing of some sort. He determined, however, being biased and prejudiced, as admitted by the pleadings, that the appellant should not be present at that hearing. He therefore conducted that hearing in secret, in a locked private room of the court house, from which the public was excluded. He conducted that secret hearing, furthermore, without notice to the appellant. He took deliberate steps, indeed, to make certain that the appellant should not learn of that secret hearing until after it was over; this was because an earlier attempt to conduct the hearing in secret had failed.* The judge refused to receive any evidence from, or hear any argument of, the appellant that might tend, in any way, to change the preconceived notions that, upon suspicion merely, and without evidence, had entered his biased and prejudiced mind.

The Supreme Judicial Court of the Commonwealth knows full well that the said state statute, under the provisions of which the new trials were ordered, has deprived the appellant of due process; else that Court would have affirmed the decision of the single justice (see pp. 5 and 6 of the said Statement As To Jurisdiction). The only reason that the Supreme Judicial Court has denied relief to the appellant is that, in its opinion, the appellant should have tested the constitutionality of the statute, not by way

*The details are given more fully on pp. 14 to 17 of the Appellant's Motion To Supplement The Record and Memorandum, on file in this Court in each of the two suits, Nos. 433 and 434.

of certiorari or mandamus, but rather by bill of exceptions, under the provisions of another state statute, Chapter 231, section 113 of the said General Laws.

This holding of the Supreme Judicial Court was directly contrary, however, to a previous holding, made summarily, without hearing, by the same Supreme Judicial Court, to the effect that a bill of exceptions was *not* the "proper" remedy for testing the jurisdiction of the Superior Court to issue the orders for new trial (p. 7 of the Statement As To Jurisdiction.)

The appellant has therefore been deprived of his vested rights in the jury's verdicts without even being afforded a hearing:

First, in the Superior Court;

Secondly, in the Supreme Judicial Court;

and now, since his appeals have been dismissed,

Thirdly, in this Court, also.

The dismissal of the appeals may have been influenced by the holding of the Supreme Judicial Court (at the bottom of p. 17 and the top of p. 18 of the Statement As To Jurisdiction) to the effect that the appellant still has a remedy by proceeding with the ordered new trials. The fact is, however, that the new trials cannot afford the appellant any remedy whatever, irrespective of the outcome of the new trials.

If the new trials should result in new verdicts of the jury in the appellant's favor, those new verdicts would be assailable by the defendants as absolutely void, because the

orders for new trial are themselves absolutely void. Notwithstanding the state statute, Chapter 231, section 127, the Superior Court possessed no more jurisdiction to order those new trials than was possessed by the man who runs the elevator in the court-house building. If, on the other hand, the appellant should fail in his suits on the new trials, he would still have no means for testing either the validity of the Superior Court's orders for the new trials or the constitutionality of the state statute under the provisions of which the orders for new trial were issued. The suggestion of the Supreme Judicial Court that the remedy lies in a bill of exceptions, as before explained, is without basis, because the appellant has already invoked that remedy, and he has been informed, by both the Superior Court and the Supreme Judicial Court that that is not a "proper" remedy.

In the opinion of legal commentators, this Court has traveled a long way since it first enunciated the doctrine of the "insubstantial federal question," in *Zucht* v. *King*, 260 U.S. 174, 176-177. Attention is invited to Appendix A.

The appellant therefore prays that this Court grant rehearing or reconsideration in the said suits, Nos. 433 and 434; further, that it note jurisdiction of the appeals in the said two suits; and also that the appellant be afforded an opportunity to brief and argue the merits of the substantial questions of law presented by the said appeals.

Respectfully submitted,

DAVID RINES,
No. Ten Post Office Square,
Boston 9, Massachusetts,
Counsel for Appellant.

RINES AND RINES,
of Counsel.

CERTIFICATE.

I hereby certify that the foregoing petition is presented in good faith, and not for the purposes of delay, and that it is well founded in fact and law.

DAVID RINES,
No. Ten Post Office Square,
Boston 9, Massachusetts,
Counsel for Appellant.

Service of a copy of the foreging Petition for Rehearing or Reconsideration is acknowledged this day of January, 1954.

.....

Assistant Attorney General,
Attorney for the Appellees.

APPENDIX A.

A number of legal papers have expressed the opinion that this Court is not complying with the will of Congress that it take obligatory jurisdiction of appeals. Perhaps as illustrative as any is the following statement, by Professor John P. Frank, "The United States Supreme Court: 1950-1951," The University of Chicago Law Review, vol. 19, No. 2, p. 165, at p. 231:

> If the Court treats truly arguable questions as "insubstantial," or if it summarily affirms appeals, it has for all practicable purposes obliterated the very difference between certiorari and appeals which Congress meant to preserve. The Court has for some years been in the process of interpreting away the difference between appeals and certiorari, reducing the appeals also to a matter of its own discretion; and it seems probable that within a few years there will be little practical difference between the two methods of review.

The bar recognizes the fact, of course, that this Court cannot possibly handle all the cases that come before it. One solution to this part of the problem is proposed at the close of an article on "The Insubstantial Federal Question," 62 Harvard Law Review, 1948-1949, p. 488, at p. 496. That proposed solution is that the Court seek to lighten its mandatory appellate jursidiction by seeking relief from Congress. Since the Court has not looked with favor on this proposal, however, it would appear that it is quite willing to continue to carry the load that Congress has prescribed. Under the circumstances, it is believed that the appellant ought to be accorded the kind of hearing, on his appeals, that Congress, apparently with the full approval of this Court, has provided for.

Nos. 433 and 434. RINES, ADMINISTRATOR, *v.* JUSTICES OF THE SUPERIOR COURT. Appeals from the Supreme Judicial Court of Massachusetts. *Per Curiam:* The appeals are dismissed for the want of a substantial federal question. *David Rines* for appellant. Reported below: 330 Mass. 368, 113 N. E. 2d 817.